Date and Time: Friday, September 22, 2023 5:25:00PM EDT

Job Number: 206456693

Document (1)

1. *Pittman v. Swanson, 2023 U.S. Dist. LEXIS 41336*

Client/Matter: -None-

Search Terms: violation of oath of office.

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Court: U.S. Federal

Pittman v. Swanson

United States District Court for the District of Minnesota

January 27, 2023, Decided; January 27, 2023, Filed

Case No. 11-CV-3658 (PJS/TNL); Case No. 11-CV-3711 (PJS/TNL); Case No. 11-CV-3728 (PJS/TNL); Case No. 12-CV-318 (PJS/TNL)

Reporter
2023 U.S. Dist. LEXIS 41336 *; 2023 WL 2404044

Michael Pittman, Plaintiff, v. Lori Swanson; Governor Dayton; Dennis Benson; Lucinda Jesson; Cal Ludeman; Greg Carlson; Kevin Moser; David Prescott; Janine Hebert; Tom Lundquist; Elizabeth Barbo; Linda Anderson; Kelli Minor; Rob Rose; Dominique Wilson; Allison Collins; Debbie James; Terry Kneisel; Sara Kulas; James Martinez; Craig Berg; Vickie Aldridge; and Ramsey County Social Services Corrine Malaske, Defendants.Jamaal Carey, Plaintiff, v. Lori Swanson; Governor Dayton; Dennis Benson; Lucinda Jesson; Cal Ludeman; Greg Carlson; Kevin Moser; Eric Skon; Janine Hebert; Tom Lundquist; Elizabeth Barbo; Nancy Johnson; Troy Sherwood; Tim Gore; Jennifer Jenniges; Stacey Sonnek; Julie Rose; Terry Kneisel; Seth Doe; and Clay County Social Services Jane Doe, Defendants.Charles A. Talyor (aka Terrance A. Pettis), Plaintiff, v. Lori Swanson; Governor Dayton; Dennis Benson; Lucinda Jesson; Cal Ludeman; Greg Carlson; Kevin Moser; David Prescott; Ph.D., LP Janine Hebert; Tom Lundquist; Elizabeth Barbo; Linda Anderson; Kelli Minor; Rob Rose; Dominique Wilson; Allison Collins; Debbie James; Terry Kneisel; Sara Kulas; James Martinez; Craig Berg; Vickie Aldridge; Hennepin County Social Services; Nicole Armstrong, Defendants.Earl Stephan McMoore, Plaintiff, v. Lori Swanson; Governor Dayton; Dennis Benson; Lucinda Jesson; Cal Ludeman; Greg Carlson; Kevin Moser; David Prescott; Ph.D., LP Janine Hebert; Tom Lundquist; Elizabeth Barbo; Linda Anderson; Kelli Minor; Rob Rose; Dominique Wilson; Allison Collins; Debbie James; Terry Kneisel; Sara Kulas; Tara Osborne; Jane Stinar; Vickie Aldridge; and Hennepin County Social Services Nicole Armstrong, each sued in their individual capacity and in their official capacity as employees of the State Attorney General's ***Office***, the Governor's ***Office***, and the Minnesota Department of Human Services, Defendants.

Subsequent History: Adopted by, Dismissed by, Without prejudice, Injunction denied by, Without prejudice, Motion denied by, Without prejudice, Motion denied by *Pittman v. Swanson, 2023 U.S. Dist. LEXIS 31615, 2023 WL 2238703 (D. Minn., Feb. 27, 2023)*

Prior History: *Pittman v. Swanson, 2023 U.S. Dist. LEXIS 41335 (D. Minn., Jan. 27, 2023)*

Core Terms

Plaintiffs', cause of action, recommends, policies, mail, Complaints, official capacity, alleges, courts, deprivation, conspiracy, individual capacity, conditions, searches, confinement, defendants', fails, restricting, detainees, detention, religion, motions, rights, injunctive relief, monitoring, constitutional right, alleged ***violation***, plaintiff's claim, matter of law, credentialing

Counsel: **[*1]** For Plaintiff: Terrance A. Pettis, Moose Lake, MN.

For Plaintiff: Jamaal Carey, Moose Lake, MN.

For Plaintiff: Earl Stephan McMoore, Moose Lake, MN.

For Plaintiff: Michael Pittman, Moose Lake, MN.

For Defendant: Minnesota Attorney General's ***Office***, St. Paul, MN.

For Defendant: Corrine Malaske, Ramsey County Social Services, St. Paul, MN.

For Defendant: Jane Doe, Clay County Social Services, Moorhead, MN.

For Defendant: Nicole Armstrong, Hennepin County Social Services, Government Center, Minneapolis, MN.

Judges: Tony N. Leung, United States Magistrate Judge.

Opinion by: Tony N. Leung

Opinion

REPORT AND RECOMMENDATION

Plaintiffs Terrance A. Pettis,[1] Jamaal Carey, Earl Stephan McMoore, and Michael Pittman[2] are clients of the Minnesota Sex Offender Treatment Program (MSOP) in Moose Lake, Minnesota. Over a decade ago, each Plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983. Shortly after each lawsuit was filed, however, a stay was imposed during the pendency of *Karsjens v. Piper*, Civil No. 11-3659 (DWF/TNL), and that stay was not lifted until October 3, 2022. Thus, despite being very old proceedings, very little has happened in these cases.

Several motions remain pending in these matters, including motions for preliminary **[*2]** injunctive relief and applications to proceed *in forma pauperis* ("IFP"). Each plaintiff qualifies financially for IFP status, but because they have applied to proceed IFP, their pleadings are subject to preservice review under 28 U.S.C. § 1915(e)(2)(B). This Court has now conducted that review and concludes, for the reasons explained below, that most (though not all) of the claims raised in each of the four Complaints should be dismissed. This Court also recommends denial of the motions for preliminary injunctive relief and declaratory relief.

I. INTRODUCTION

The Complaints submitted in these matters defy easy summarization. Each is tremendously long (around 100 pages), and each is more a laundry-list of grievances than a pleading with an ascertainable narrative. Accordingly, this Court will, for the most part, defer summarizing the factual allegations raised in the complaints until the discussion below of each individual claim raised in those complaints. For now, it suffices to say that the theme of each complaint is that each Plaintiff regards the conditions of his confinement at MSOP to be unlawful.

That said, the four Complaints in these four proceedings are overwhelmingly similar to one another. The pleadings **[*3]** repeat the same factual allegations and present substantially the same legal claims.[3] In fact, the pleadings even emphasize the same words.[4] The named defendants are also substantially the same. Pittman, Pettis, and McMoore identify twenty-three defendants; of these defendants, twenty-one are identical. Carey's pleading names eleven defendants identical to those in the other three pleadings. And even where the complaints differ in the named defendants, those differences are superficial, at best—for example, each Complaint identifies the social services supervisor in the county responsible for the Plaintiff's commitment, this person is not the same for all four Plaintiffs because their commitments did not originate in the same county. *Carey*, ECF No. 1 at ¶ 32; *McMoore*, ECF No. 1 at ¶ 35; *Pettis*, ECF No. 1 at ¶ 35; *Pittman*, ECF No. 1 at ¶ 35. Similarly, Carey names Eric Skon as a defendant in ¶ 20 of his complaint, *Carey*, ECF No. 1 at ¶ 20, whereas the other Plaintiffs name David Prescott as a defendant in ¶ 20 of their complaints. *See Pittman*, ECF No. 1 at ¶ 20; *Pettis*, ECF No. 1 at ¶ 20; *McMoore*, ECF No. 1 at ¶ 20. But the descriptions of each Skon and Prescott, who appear to have served **[*4]** similar roles at MSOP, are

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[1] Pettis is named in his Complaint as "Charles A Taylor, aka Terrance A. Pettis." *Pettis*, ECF No. 1. The body of the Complaint itself, however, refers to this Plaintiff consistently as Pettis rather than Taylor, and this Court will do the same.

[2] The Court recognizes that Pittman has legally changed his name to Maikijah Ab'dul HaKeem since filing this action. *In re the Application of Michael Dijon Pittman for a Change of Name*, Case No. 09-CV-13-687 (Minn. Dist. Ct. March 29, 2013). For the sake of consistency with the underlying documents, however, this Court will refer to this Plaintiff by the name that appears in his Complaint.

[3] The twenty-first cause of action in the Complaints of Pettis and Pittman allege "denial of liberty." *See Pettis*, ECF No. 1 at ¶¶ 276-78; *Pittman*, ECF No. 1 at ¶¶ 276-78. This claim appears identical to their sixth cause of action, which is also titled "denial of liberty," and is the same as the sixth cause of action in the Complaints of Carey and McMoore. *See Pettis*, ECF No. 1 at ¶ 231; *Pittman*, ECF No. 1 at ¶ 231; *Carey*, ECF No. 1 at ¶ 232; *McMoore*, ECF No. 1 at ¶ 231. Pettis and Pittman's twenty-first cause of action will therefore be addressed alongside the sixth cause of action. The twenty-first cause of action in the Complaints of McMoore and Carey, by contrast, alleges "conspiracy to place plaintiff outside of the law in ***violation*** of the 1st, 5th, and 14th Amendments of the United States Constitution and 42 U.S.C. § 1985(3)." *See McMoore*, ECF No. 1 at ¶¶ 276-78; *Carey*, ECF No. 1 at ¶¶ 277-79. This cause of action is addressed separately below.

[4] This Court strongly suspects that each of the Plaintiffs began with the same master document as a template and simply replaced names as necessary. There are, to be sure, minor variations in each of the documents—and to be clear, this Court has reviewed each of the four complaints individually—but those variations are immaterial where not discussed in this Recommendation.

essentially identical.[5]

Because the complaints are so similar, this Court will generally discuss these cases as though it were a single proceeding rather than four. To the extent that there are differences—and there are a very small number of material differences, mostly relating to the complaint filed by Carey—those differences are specifically identified and addressed below.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), an IFP application will be denied, and an action will be dismissed, when an IFP applicant has filed a complaint that fails to state a claim on which relief may be granted. *See* Atkinson v. Bohn, 91 F.3d 1127, 1128 (8th Cir. 1996) (per curiam). In reviewing whether a complaint (or portion thereof) states a claim for which relief may be granted, this Court must accept the complaint's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. Varga v. U.S. Nat'l Bank Ass'n, 764 F.3d 833, 838 (8th Cir. 2014). The factual allegations need not be detailed, but they must be sufficient "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The complaint must "state a claim to relief that is plausible on its face." Id. at 570. Pro se complaints are to be construed liberally, but they must **[*5]** still allege enough facts to support the claims advanced. Stone v. Harry, 364 F.3d 912, 914 (8th Cir. 2004) (citing cases).

III. ANALYSIS

The Plaintiffs present two broad categories of claims in these proceedings: (1) claims of ***violations*** of civil rights brought under 42 U.S.C. § 1983, and (2) claims of ***violations*** of state law. Each set of claims is addressed, in turn, below.

A. 42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege a ***violation*** of a constitutional right committed by a person acting under color of state law." Andrews v. City of West Branch, Iowa, 454 F.3d 914, 918 (8th Cir. 2006). "Public servants may be sued under section 1983 in either their official capacity, their individual capacity, or both." Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) (citing Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997)). Individual and official capacity claims differ in their pleading requirements, the defenses available to the defendants, and the relief available to the plaintiffs. *See* Hafer v. Melo, 502 U.S. 21, 25-27, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Here, each defendant is named in both that person's individual capacity and his or her official capacity as an agent of the entity for which he or she works—usually, the State of Minnesota.

1. Individual Capacity Claims

"Suits against officials in their individual capacity seek to impose personal liability upon a government official for actions he takes under color of state law." Handt v. Lynch, 681 F.3d 939, 943 (8th Cir. 2012) (quoting Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). To establish liability against officials in their individual **[*6]** capacity, "the plaintiff must show that the official, acting under color of state law caused the deprivation of a federal right." Id. at 943 (citing Graham, 473 U.S. at 166) (emphasis added); *see also* Mayorga v. Missouri, 442 F.3d 1128, 1132 (8th Cir. 2006) ("Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights."). Put another way, it is not enough for a plaintiff seeking relief from a defendant in the defendant's individual capacity to allege that his rights were violated; the plaintiff must instead allege that his rights were violated *by the defendant*. And those allegations must at a minimum be plausible to be afforded the usual presumption of truth at the pleading stage. *See* Twombly, 550 U.S. at 570.

The four Plaintiffs in these cases attempt to solve this problem with a blunderbuss, alleging that *everyone* did nearly *everything*. Thus, for example, the Plaintiffs allege that "defendants" (without saying who) "locked [the Plaintiff] in his room when [he] had complaint of the prison policies being implemented." *Pettis*, ECF No. 1 at ¶ 59; *Pittman*, ECF No. 1 at ¶ 59; *McMoore*, ECF No. 1 at ¶ 59; *Carey*, ECF No. 1 at ¶ 60. Those defendants include, among others, the governor of the State of Minnesota at the time these lawsuits were filed. But the

[5] Although ¶ 20 of Carey's complaint identifies "Eric Skon" as a defendant, the corresponding description contains a reference to "Mr. Prescott." *Carey*, ECF No. 1 at ¶ 20. This inconsistency may be nothing more than a typographical error, but it further adds to the Court's suspicion that these four Plaintiffs were working off the same master document in preparing their pleadings.

allegation **[*7]** that the former governor either personally locked each Plaintiff in his room or personally directed others to lock each Plaintiff in his room for several hours as punishment utterly strains credulity. Nor does it help to allege that "Mrs. Lori Swanson, Governor Dayton, Dennis Benson, Lucinda Jesson, Cal Ludeman, Greg Carlson, Kevin Moser, David Prescott, Janine Hebert, Tom Lundquist, Elizabeth Barbo, Linda Anderson, Kelli Minor, Rob Rose, Dominique Wilson, Allison Collins, Debbie James, Terry Kneisel, Sara Kulas, James Martinez, Craig Berg, Vickie Aldridge, and Nicole Armstrong knew or should have known about and approved or failed to prevent" the allegedly unlawful behavior, *see Pettis*, ECF No. 1 at ¶ 59; *Pittman*, ECF No. 1 at ¶ 59; *McMoore*, ECF No. 1 at ¶ 59, to cite just one example. Which defendant "approved" the policy? Which merely "failed to prevent" it? How so?[6]

Such "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not suffice to establish a viable cause of action under § 1983. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Moreover, by alleging that every defendant is responsible for nearly everything (including defendants for whom that is almost certainly not true), **[*8]** Plaintiffs have rendered their factual allegations implausible as to *every* defendant, as there is generally no way of knowing from the complaint which of the defendants might reasonably be believed to have participated in a specific event.

This above example is only one of countless that this Court could offer. With only three exceptions—discussed below—Plaintiffs allege that every defendant performed every single action or was responsible for every single omission that is being alleged to have violated the law. Every single one of those defendants is named to all but one of the twenty-three causes of action.[7] This kitchen-sink approach is not good enough. Neither the defendants nor the Court would have any reason to know from the complaints, prolix though they are, why each defendant, specifically, is being named to this litigation. Accordingly, this Court will recommend that the overwhelming majority of personal-capacity claims under § 1983 be dismissed without prejudice.

There are, however, three instances where the Plaintiffs have pleaded factual allegations with greater specificity. Those instances merit further comment. First, Plaintiffs allege that defendants Rob Rose, **[*9]** Julie Rose, and Terry Kneisel "will purposefully and maliciously delay delivering the mail in a blanket attempt to frustrate, anger and harass [them]." *Carey*, ECF No. 1 at ¶ 95;[8] *McMoore*, ECF No. 1 at ¶ 94; *Pettis*, ECF No. 1 at ¶ 94; *Pittman*, ECF No. 1 at ¶ 94. This is a marked improvement insofar as specific defendants are alleged to have taken specific actions. "Allegations of sporadic and short-term delays in receiving mail are insufficient to state a cause of action grounded upon the *First Amendment*." *Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000)*. That said, the complaints might reasonably be inferred to be alleging something beyond "sporadic" delays, with two defendants purposefully delaying delivery of mail. This Court will not yet recommend dismissal of this aspect of Ground Two as raised against Rob Rose, Julie Rose, and Terry Kneisel in their personal capacities.[9]

Second, Plaintiffs allege that on at least two occasions defendant Rob Rose or Julie Rose denied them "access to the gym as punishment for some alleged or perceived ***violation*** of some rule or some other misbehavior" without due process. *See McMoore*, ECF No. 1 at ¶¶ 65-68; *Carey*, ECF No. 1 at ¶¶ 66-69; *Pittman*, ECF No. 1 at **[*10]** ¶¶ 65-68; *Pettis*, ECF No. 1 at ¶¶ 65-68.[10]

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[6] Similarly, Carey alleges that all the defendants named in his Complaint "knew or should have know about or failed to prevent" the unlawful behavior. *Carey*, ECF No. 1 at ¶ 60. The problems with Carey's Complaint and the other three are thus the same, the only difference being *who* is named as a defendant.

[7] Only defendants Mark Dayton and Lori Swanson are claimed to have violated their ***oaths*** of ***office*** in the twentieth cause of action. *See, e.g., Carey*, ECF No. 1 at ¶¶ 273-74.

[8] The Court notes that whereas McMoore, Pettis, and Pittman name Rob Rose as a defendant in their complaints, *McMoore*, ECF No. 1 at ¶ 26; *Pettis*, ECF No. 1 at ¶ 26; *Pittman*, ECF No. 1 at ¶ 26, Carey identifies Julie Rose as a defendant, *Carey*, ECF No. 1 at ¶ 29. The four complaints, however, are virtually identical in describing Rob (or Julie) Rose's alleged involvement in disrupting the delivery of Plaintiffs' outgoing and incoming mail. *See Carey*, ECF No. 1 at ¶¶ 93-97; *McMoore*, ECF No. 1 at ¶¶ 92-96; *Pittman*, ECF No. 1 at ¶¶ 92-96; *Pettis*, ECF No. 1 at ¶¶ 92-96.

[9] This Court is not prepared to say that Plaintiffs have stated a claim on which relief may be granted, only that the complaint presents a colorable enough claim for relief that it may be permitted survive review under § 1915(e)(2)(B). Nothing in this Recommendation precludes defendants from seeking dismissal of the claim or any other aspect of the complaint, whether for failure to state a claim or for any other reason.

[10] Here, again, although Carey identifies the defendant as Julie

This Court is dubious that MSOP clients have a protected liberty interest in use of the gym and therefore dubious that Plaintiffs were entitled to due process before being deprived of access to the gym. Nevertheless, this claim will also not be recommended for dismissal at this time.

Third, Carey alleges that on or about December 12, 2011, he was asking to speak to a supervisor in response to a punitive report he had received for "simply compliment[ing] a female staff on her good looks," when Defendant "Seth Doe" grabbed him from behind "without provocation" and sprayed him with a chemical irritant in the face "without warning." *Carey*, ECF No. 1 at ¶¶ 53-55. This claim also will not be recommended for dismissal, though as a practical matter, Carey may have difficulty prosecuting a claim against an unidentified defendant.

These three claims aside, this Court finds that each of plaintiffs' claims under *§ 1983* against each of the defendants in their individual capacities fall as a matter of law. Accordingly, it will be recommended that each of these claims be dismissed without prejudice pursuant to *§ 1915(e)(2)(B)*.

2. Official Capacity Claims

The remaining capacity claims **[*11]** are claims against the defendants in their official capacities. "A suit against a government official in his or her official capacity is another way of pleading an action against an entity of which an officer is an agent." *Baker v. Chisom, 501 F.3d 920, 925 (8th Cir. 2007)* (citing *Monell v. Dep't of Social Services, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*). Put differently, "the real party in interest in an official-capacity suit is the governmental entity and not the named official." *Baker, 501 F.3d at 925* (quoting *Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)*).

With one exception in each lawsuit, each defendant is alleged to be an agent of the State of Minnesota. However, "[n]either a state nor its officials acting in their official capacities are 'persons' under *§ 1983*" when sued for money damages. *Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*. Thus, state officials may only be sued in their official capacities for prospective injunctive relief. *Ex parte Young, 209 U.S. 123, 157-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*; *Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 255 (8th Cir. 1995)* ("*Ex parte Young* recognized that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future ***violations*** of federal law.").

3. County Social Services Worker as a Defendant

That one exception referenced above is that each lawsuit names as a defendant the social services worker who purportedly filed the petition initiating the civil commitment process. *Carey*, ECF No. 1 at ¶ 32; *McMoore*, ECF No. 1 at ¶ 35; *Pettis* ***[*12]*** , ECF No. 1 at ¶ 35; *Pittman*, ECF No. 1 at ¶ 35. Each Plaintiff names this defendant in her individual and official capacity. Any claim against this particular defendant in any capacity necessarily fails.

Although Plaintiffs allege that they have been subjected to a number of constitutional ***violations*** at MSOP, they fail to allege how the *county* social services worker is personally involved in or directly responsible for these alleged ***violations***, which is necessary to establish an individual capacity claim. *See Madewell v. Roberts, 909 F.2d 1203, 1208 (8th Cir. 1990)*. Further, they fail to establish an official capacity claim involving this defendant because nowhere do they plausibly argue that the county, this defendant's employer, has any role in operating or maintaining MSOP, a facility operated by the State of Minnesota. Accordingly, any claim against any of the county social services workers, specifically Nicole Armstrong and Corrine Malaske, should be dismissed.

With these considerations in mind, the Court turns now to the substance of Plaintiffs' *§ 1983* claims.

B. Specific *§ 1983* Claims

1. Failure to Provide Treatment

All four Plaintiffs allege as their first cause of action that MSOP has failed to offer any treatment in ***violation*** of their constitutional **[*13]** rights and the Minnesota Civil Commitment and Treatment Act ("the Act"). *Carey*, ECF

Rose, Plaintiffs McMoore, Pittman and Pettis identify the defendant as Rob Rose. The substantive allegations against these defendants (Rob Rose and Julie Rose) are, again, nearly identical, leading this Court to question whether they are, in fact, different people. This is an issue, however, for a different day.

No. 1 at ¶ 217; *McMoore*, ECF No. 1 at ¶ 216; *Pettis*, ECF No. 1 at ¶ 216; *Pittman*, ECF No. 1 at ¶ 216. The claims regarding Plaintiffs' access to treatment—and the quality of that treatment—are identical to those raised in the *Karsjens* litigation. In *Karsjens v. Piper, 336 F. Supp. 3d 974, 983-84 (D. Minn. 2018)*, *affirmed in part, vacated in part, remanded by Karsjens v. Lourey, 988 F.3d 1047 (8th Cir. 2021)* (*Karsjens II*), the district court considered the plaintiff's claim that "the multitude of issues with the MSOP's treatment program, when considered as a system-wide problem, reach the level of conscious shocking behavior that violates due process." *Id. at 984*. The court disagreed, concluding that "committed individuals do not have a recognized 'due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." *Id.* (citing *Karsjens I, 845 F.3d at 410*). Accordingly, the district court found that the plaintiffs' "failure-to-provide treatment claim lacks merit." *Id. at 985*. In *Karsjens II* the Eighth Circuit upheld the district court's holding, concluding that the district court properly dismissed this claim. *Id. at 1051*.

The *Karsjens* litigation involved named plaintiffs representing **[*14]** a class of over 700 individuals committed to MSOP. *Karsjens v. Jesson, 109 F. Supp. 1139, 1145 (D. Minn. 2015)*, *reversed and remanded by Karsjens I, 845 F.3d 394*. As persons civilly committed to MSOP, plaintiffs are members of this class. As such, the court's holding in rejecting plaintiffs' "failure-to-provide-treatment" claim is determinative here. *See Cooper v. Federal Reserve Bank, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)* ("[A] judgment in a properly entertained class action is binding on class members in subsequent litigation."). Accordingly, this Court recommends dismissal of this claim as a matter of law.

2. *First Amendment* Claims

Plaintiffs' second and seventh causes of action specifically allege ***violations*** of the *First Amendment*, including Plaintiffs' right to freedom of speech and their right to free exercise of religion. *Carey*, ECF No. 1 at ¶¶ 220-222 & 235-37; *McMoore*, ECF No. 1 at ¶¶ 219-21 & 234-36; *Pettis*, ECF No. 1 at ¶¶ 219-21 & 234-36; *Pittman*, ECF No. 1 at ¶¶219-21 & 234-36. At various points in their Complaints, Plaintiffs also allege other ***violations*** of their *First Amendment* rights, including freedom of association. *Carey*, ECF No. 1 at ¶ 90; *McMoore*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89). These claims are addressed below.

a. Freedom of Speech

The right to freedom of speech "includes not only the right to utter or to print, but **[*15]** the right to distribute, the right to receive, the right to read as well as freedom of inquiry and freedom of thought." *Karsjens v. Jesson, 6 F. Supp. 3d. 916, 938-39 (D. Minn. 2014)* (citing *Griswold v. Connecticut, 381 U.S. 479, 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)*). "Although civilly committed individuals retain these *First Amendment* protections, 'any form of involuntary confinement, whether incarceration or involuntary commitment, may necessitate restrictions on the right to free speech.'" *Karsjens, 336 F. Supp. 3d at 993* (quoting *Beaulieu, 690 F.3d at 1039*). Plaintiffs allege that several policies constitute unreasonable restrictions on their freedom of speech.

i. Access to Magazines and Newspapers

First, Plaintiffs claim that, at one time, the defendants had established a policy denying them access to "any" magazines or newspapers. *Carey*, ECF No. 1 at ¶ 101; *McMoore*, ECF No. 1 at ¶ 100; *Pettis*, ECF No. 1 at ¶ 100; *Pittman*, ECF No. 1 at ¶ 100. Such a blanket ban on all newspapers and magazines would establish a plausible *§ 1983* claim. *See Cooper v. Schriro, 189 F.3d 781, 784 (8th Cir. 1999)* (concluding that prisoner's allegation that defendant denied him access to all magazines was sufficient to state a cognizable *§ 1983* claim). As explained above, however, plaintiffs fail to identify which defendants were specifically personally involved in denying them access to magazines or newspapers. *Mayorga v. Missouri, 442 F.3d 1128, 1132 (8th Cir. 2006)* (To sustain a personal capacity claim, a plaintiff "must allege **[*16]** specific facts of personal involvement in, or direct responsibility for, a deprivation of his constitutional rights."). Plaintiffs' individual-capacity claims thus fail; only the official-capacity claims remain, and the only relief available from the defendants is for prospective injunctive relief. *See Fond du Lac Band of Chippewa Indians, 68 F.3d at 255*. But Plaintiffs concede in the pleadings that this blanket ban is no longer in effect, and thus there is no prospective injunctive relief that the Court could provide with respect to that ban. This aspect of the claim has thus become moot.

Plaintiffs also allege that the replacement policy—one in

which newspapers and magazines are allegedly censored to remove articles related to "the MSOP program, the civil commitment statute or someone who was to be committed under the program"—violates their constitutional rights. *Carey*, ECF No. 1 at ¶ 102; *McMoore*, ECF No. 1 at ¶ 101; *Pettis*, ECF No. 1 at ¶ 101; *Pittman*, ECF No. 1 at ¶ 101. They further allege that the defendants have enacted a policy restricting their access to unspecified magazines and newspapers. *Carey*, ECF No. 1 at ¶ 90; *McMoore*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89. This Court will not recommend **[*17]** dismissal of this aspect of Plaintiffs' *First Amendment* claim at this time.

ii. Non-Legal Mail and Non-Legal Telephone Policies

Plaintiffs also list several other policies which they find objectionable: the policy of routinely searching the contents of incoming and outgoing non-legal mail; the policy of delaying the mail; the policy of monitoring non-legal telephone calls; the implementation of an "expensive prison phone system;" the policy of "using the voice automated system on the patient phones to frighten the public that a sex offender is calling;" and the policy of denying free phone calls to businesses, county case managers, the local police department and any elected official. *Id.* Although Plaintiffs do not frame these policies as alleged ***violations*** of their *First Amendment* right to freedom of speech, this Court, recognizing that pro se complaints are to be construed liberally, *see Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*, construes them as such.

Courts in this district, however, have previously considered and rejected *First Amendment* challenges to MSOP's policy permitting the inspection of outgoing and incoming non-legal mail and MSOP's telephone policy permitting charging for phone calls and permitting the monitoring of non-legal calls. *See Karsjens, 336 F. Supp. 3d at 994* (citing *Semler v. Ludeman, 09-CV-0732 (ADM/SRN), 2010 U.S. Dist. LEXIS 1571, 2010 WL 145275, at * 10 (D. Minn. Jan. 8, 2010)*). Plaintiffs' **[*18]** claims are identical to those in *Karsjens*. No Plaintiff advances a particularized claim about any of these policies. *Karsjens, 336 F. Supp. 3d at 994 n.13* (allowing for individual clients at MSOP to advance individualized claims about MSOP's mail and phone policies). As previously noted, as a member of the class of plaintiffs in *Karsjens*, therefore, the holding in *Karsjens* is determinative here. Accordingly, this Court recommends that these claims be dismissed.

iii. Delay in Delivery of Non-Legal Mail and Packages

This Court has already discussed the claim that defendants Rob Rose, Julie Rose, and Terry Kneisel purposefully delayed delivery of mail to the Plaintiffs; that claim has not been recommended for dismissal as brought against those defendants in their individual capacities. Insofar as Plaintiffs also seek prospective injunctive relief from these defendants in their official capacities to prevent those individuals from continuing to delay delivery of the mail, that claim will be recommended to go forward as well.

To the extent that Plaintiffs seek relief from the remaining defendants in their official capacities, that claim appears to be predicated upon the existence of allegedly unlawful policies or practices that **[*19]** have the effect of delaying or impeding the mails. Plaintiffs claim that until recently, there were no policies and procedures on the processing of outgoing and incoming mail. *See* Carey, ECF No. 1 at ¶ 93; *McMoore*, ECF No. 1 at ¶ 92; *Pettis*, ECF No. 1 at ¶ 92; *Pittman*, ECF No. 1 at ¶ 92. Plaintiffs believe that the absence of any policies resulted in the loss and mishandling of their mail. *Id.* Yet, again, prospective injunctive relief is no remedy here because Plaintiffs concede that this "lack of a policy" has been rectified. *Carey*, ECF No. 1 at ¶ 94; *McMoore*, ECF No. 1 at ¶ 93; *Pettis*, ECF No. 1 at ¶ 93; *Pittman*, ECF No. 1 at ¶ 93. Accordingly, this claim is moot.

Under the subsequent policy—the policy in effect at the time these actions were filed—Plaintiffs explain that outgoing mail is first deposited in a locked mailbox located on the unit and then once a day administrative staff delivers the mail to the U.S. Post ***Office***, and incoming mail is distributed to the clients at night during lockdown. *Carey*, ECF No. 1 at ¶ 95; *McMoore*, ECF No. 1 at ¶ 94; *Pettis*, ECF No. 1 at ¶ 94; *Pittman*, ECF No. 1 at ¶ 94. Apart from the specific actions attributed to Rob Rose, Julie Rose, and Terry **[*20]** Kneisel (which were not consistent with that policy), this Court cannot say why this mail policy is believed by the plaintiffs to be unlawful or why injunctive relief would be appropriate with respect to the other defendants. Accordingly, this Court recommends that any claim against the defendants in their official capacities regarding MSOP's mail delivery policy be dismissed.

iv. Right to Wear Clothing

Plaintiffs claim that the defendants' policy of prohibiting them from wearing certain types of clothing, including "hats, doo rags, bandanas, and muscle shirts," within the confines of their own living unit is unnecessarily restrictive. *McMoore*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89; *Carey*, ECF No. 1 at ¶ 90. The Plaintiffs fail to moor this policy as an alleged ***violation*** of any specific constitutional right. In the absence of any guidance from the Plaintiffs, this Court considers whether Plaintiffs have articulated a viable claim under the umbrella of the protections afforded by the *First Amendment*.

The United States Supreme Court has "long recognized that [*First Amendment*] protection does not end at the spoken or written word." *Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)*. "While [the Supreme Court has] rejected the view **[*21]** that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends to thereby express an idea, [the Court has] acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and *Fourteenth Amendments*." *Id.* (internal citations omitted). In determining whether "particular conduct possesses sufficient communicative elements to bring the *First Amendment* into play, [the Supreme Court] has asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Id.* The burden is on the movant to demonstrate that the intended conduct is protected under the *First Amendment*. *Bear v. Fleming, 714 F. Supp. 2d 972, 979 (D.S.D. 2010)* (citing *Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 294 n.5, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)* ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the *First Amendment* even applies.")).

Certainly, clothing choices could qualify as protected speech under the *First Amendment*. *See Bear, 714 F. Supp. 2d at 979-83* (describing cases). But the court's analysis is fact-intensive. *Id. at 980* ("Essential to deciding whether an activity carries a perceptible message entitled to [*First Amendment*] protection is an examination of the context in which the activity was conducted.") (quoting *Zalewska v. County of Sullivan, New York, 316 F.3d 314, 320 (2nd Cir. 2003)*). **[*22]** At this stage in the proceedings, therefore, this Court does not recommend that Plaintiffs' claim involving MSOP's clothing policy be dismissed.

b. Free Exercise of Religion

Plaintiffs' seventh cause of action alleges that the defendants have adopted and executed policies that unreasonably infringe on their right to free exercise of their religion. *Carey*, ECF No. 1 at ¶¶ 235-237; *McMoore*, ECF No. 1 at ¶¶ 234-236; *Pettis*, ECF No. 1 at ¶¶ 234-236; *Pittman*, ECF No. 1 at ¶¶ 234-236. These policies include monitoring plaintiffs during religious services, denying them access to religious services, and monitoring them when speaking with clergy or other religious volunteers. *Id.*

"[T]o succeed on a claim under the *Free Exercise Clause of the First Amendment*, Plaintiffs must establish that Defendants' challenged policies and practices place a 'substantial burden' on Plaintiffs' ability to practice their religion." *Karsjens, 336 F. Supp. 3d at 991* (citing *Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008)*).

Plaintiffs claim that they were not offered religious services when they were initially committed to MSOP. *See McMoore*, ECF No. 1 at ¶ 173; *Pettis*, ECF No. 1 at ¶ 173; *Pittman*, ECF No. 1 at ¶ 173; *Carey*, ECF No. 1 at ¶ 174. Although a complete failure to offer any religious services may very well constitute a substantial **[*23]** burden on Plaintiffs' ability to practice their religion in ***violation*** of the *First Amendment*, here, again, Plaintiffs' individual capacity claims against the defendants fail because Plaintiffs either fail to allege any facts identifying who, specifically, denied them access to religious services or what, specifically, those defendants did to impede their religious freedom.[11] Thus, pursuant to *Ex Parte Young*, the only relief that would be available to the Plaintiffs on this claim is prospective injunctive relief against the defendants in their official capacities. As to this claim, however, the available relief

[11] McMoore, for example, claims that Mr. Benson's actions substantially burdened his right to religious freedom. *McMoore*, ECF No. 1 at ¶ 75. McMoore does not, however, specify what Mr. Benson did (or did not do) that amounted to a substantial burden on his right to religious freedom; rather, McMoore lobs Mr. Benson in with the rest of the named defendants as being involved in the "monitoring" of religious services. *Id.* at ¶ 178. Accordingly, McMoore has failed to state a cognizable individual capacity claim against Mr. Benson for allegedly violating his constitutional rights to religious freedom. The same can be said of the Complaints of Pettis, Pittman, and Carey. *Pettis*, ECF No. 1 at ¶¶ 75 & 178; *Pittman*, ECF No. 1 at ¶¶ 75 & 178; *Carey*, ECF No. 1 at ¶¶ 76 & 179.

is not a remedy because again the Plaintiffs concede that they now have access to religious services, *Carey*, ECF No. 1 at ¶ 175; *McMoore*, ECF No. 1 at ¶ 174; *Pettis*, ECF No. 1 at ¶ 174; *Pittman*, ECF No. 1 at ¶ 174, the issue is the manner in which these services are conducted. Accordingly, Plaintiffs' claim alleging that the defendants denied them access to religious services fails as a matter of law.

Turning now to *how* these services are being conducted, Plaintiffs contend that they are monitored, depriving them of any privacy, which is particularly problematic because **[*24]** they like to pray out loud. *See Carey*, ECF No. 1 at ¶ 179; *McMoore*, ECF No. 1 at ¶ 178; *Pittman*, ECF No. 1 at ¶ 178; *Pettis*, ECF No. 1 at ¶ 178. Plaintiffs contend there is no legitimate treatment or security reason behind monitoring the religious services and the only reason for doing so is to harass, intimidate and embarrass Plaintiffs. *Id.* These claims fail, however, because Plaintiffs do not establish any facts suggesting that these policies amount to a "substantial" burden on their religion. *See* Gladson v. Iowa Dep't of Corr., 551 F.3d 825, 833 (8th Cir. 2009) (when faced with a Free Exercise claim, courts must first determine, as a threshold matter, whether the prison has placed a "substantial burden" on the prisoner's ability to practice his religion").

To find a substantial burden, the challenged regulation

> must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.

Patel, 515 F.3d at 813 (quoting Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 988 (8th Cir. 2004)). Here, Plaintiffs do not even identify the religion they practice, let alone establish **[*25]** any facts suggesting that by monitoring their religious services, the defendants are placing a substantial burden on their ability to practice that religion. Plaintiffs allege that they prefer to pray out loud, but even assuming praying out load is a central tenet of their religion, Plaintiffs concede they are not prohibited from praying out loud, only that they find it embarrassing to do so because they are being monitored. *Carey*, ECF No. 1 at ¶ 177; *McMoore*, ECF No. 1 at ¶ 176; *Pettis*, ECF No. 1 at ¶ 176; *Pittman*, ECF No. 1 at ¶ 176 Accordingly, Plaintiffs have failed to establish any facts suggesting that the defendants' policies constitute a substantial burden on their free exercise of religion. Therefore, it is recommended that this claim be dismissed.

c. Additional *First Amendment* Claims

Although not identified as a separate cause of action, Plaintiffs also allege at various points in their Complaints additional purported ***violations*** of the First Amendment. These claims are addressed here.

First, Plaintiffs allege that the defendants' policy of restricting their access to other MSOP clients violates their right to freedom of association. *See Carey*, ECF No. 1 at ¶ 79; *McMoore*, ECF No. 1 at ¶ 78; *Pittman*, ECF No. **[*26]** 1 at ¶ 78; *Pettis*, ECF No. 1 at ¶ 78. Specifically, Plaintiffs claim that the defendants have implemented a separation policy that prohibits clients who have quit treatment—clients such as themselves—from speaking with the residents who remain engaged in treatment, even though those residents would like to speak with the Plaintiffs. *See Carey*, ECF No. 1 at ¶ 79; *McMoore*, ECF No. 1 at ¶ 78; *Pittman*, ECF No. 1 at ¶ 78; *Pettis*, ECF No. 1 at ¶ 78. They further allege that MSOP policies denying them the right to visit other clients' rooms, "restricting access to and conduct during visitations," and "denying extended family visitations" are unreasonably restrictive. *See Carey*, ECF No. 1 at ¶ 90; *McMoore*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89. The Court views all these allegations under the ambit of the First Amendment right to freedom of association.

The First Amendment right of association includes "more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means." Griswold, 381 U.S. at 483. The Supreme Court has held that prisoners do not enjoy the absolute right to freedom of association. ***[*27]*** *See* Overton v. Bazzetta, 539 U.S. 126, 131, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). Although Plaintiffs are civil detainees and not prisoners, they are nonetheless subject to limitations on their rights not inconsistent with their status. *See* Senty-Haugen, 462 F.3d at 886.

Karsjens considered and rejected First Amendment challenges to MSOP's visitation policy. 336 F. Supp. 3d at 994. This judgment applies here, too. Thus, this Court recommends dismissing Plaintiffs' claims related to MSOP's visitation policies. Regarding the claims related to Plaintiffs' right to associate with other MSOP clients,

however, for the purposes of preservice screening, this Court finds that the Plaintiffs have established a colorable *First Amendment* claim.

Second, Plaintiffs allege that the defendants' policy of restricting their access to outside vendors is unreasonable. *See Carey*, ECF No. 1 at ¶ 90; *McMoore*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89. In *Senty-Haugen v. Goodno, 462 F.3d 876 (8th Cir. 2006)*, the plaintiff, a civil detainee at MSOP, claimed that he was deprived of "access to the canteen and outside vendors and computer privileges" in ***violation*** of his constitutional rights. *Id. at 886 n.7*. The Eighth Circuit rejected this argument, concluding that such limitations constitute "*de minimis* restrictions with which the Constitution is not concerned." *Id.* (citing *Bell v. Wolfish, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*). Here, Plaintiffs fail **[*28]** to establish any facts regarding MSOP's outside vendor policy, alleging only that it is unreasonable to be restricted access to certain outside vendors. *Id.* Accordingly, here, as in *Sentry-Haugen*, this Courts recommends that this claim be denied for failure to state a claim as a matter of law.

3. *Fourth Amendment* Prohibition Against Unreasonable Searches and Seizures.

Plaintiffs' second cause of action alleges that they have been subject to unreasonable searches and seizures in ***violation*** of the *Fourth Amendment*.

a. Searches

Involuntarily civilly committed persons, such as Plaintiffs, "retain the *Fourth Amendment* right to be free from unreasonable searches that is analogous to the right retained by pretrial detainees." *Beaulieu v. Ludeman, 690 F.3d 1017, 1028 (8th Cir. 2012)* (citing *Serna v. Goodno, 567 F.3d 944, 948-49 (8th Cir. 2009)*). To determine reasonableness in these settings, courts balance "the need for the particular search against the invasion of rights that the search entails." *Serna, 567 F.3d at 949* (quoting *Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*). In conducting this balancing test, courts consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* Further, as applied to search policies at the MSOP, the Eighth Circuit has rejected the need to "strictly apply a less intrusive means test." *Beaulieu, 690 F.3d at 1029*.

Here, **[*29]** Plaintiffs allege that MSOP's policies requiring clients to be strip searched after visits, to be strip searched before and after transport by MSOP officials, to be shackled during transport, and to be subject to random room visits and "shakedowns" are unconstitutional. *Carey*, ECF No. 1 at ¶¶ 90 & 123-131; *McMoore*, ECF No. 1 at ¶¶ 89 & 122-130; *Pettis*, ECF No. 1 at ¶¶ 89 & 122-130; *Pittman*, ECF No. 1 at ¶¶ 89 & 122-130. Challenges to the constitutionality of these policies, however, were considered and rejected by the court in *Karsjens, 336 F. Supp. 3d at 994-96*. In rejecting the class-wide challenge to MSOP's search policies, the court noted that courts had repeatedly upheld the constitutionality of random room searches. *Id. at 995* (citing cases). The court also concluded that it was "bound to defer to Defendants' institutional judgment regarding the need for particular search policies," because the "record lacks substantial evidence showing that the MSOP's policies are an unnecessary or unjustified response to problems of institutional security." *Id. at 996*. Because the plaintiffs were members of the *Karsjens* class, this holding is determinative. *Cooper v. Federal Reserve Bank, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)*("[A] judgment in a properly entertained class action is binding on class members in subsequent **[*30]** litigation.").

Although the court in *Karsjens* did not foreclose MSOP clients from advancing individual search and seizure claims, *Karsjens, 336 F. Supp. 3d at 996 n.14*, the Plaintiffs here fail to articulate any specific circumstances—indeed, they offer no specific facts whatsoever—that would warrant revisiting the constitutionality of MSOP's search policies as applied to searches challenged by these Plaintiffs. Accordingly, this Court recommends that Plaintiffs' *Fourth Amendment* unreasonable search claims fail as a matter of law.

b. Seizures

Plaintiffs also allege, however, that the defendants denied them the right to have a television that their parents sent to them, and that they denied them access to certain personal property, "such as their ring and belt." *Carey*, ECF No. 1 at ¶ 90; *McMoore*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89. A seizure of property occurs when there is "some meaningful interference with an individual's possessory

interest in that property." Outboard Marine Corp., 172 F.3d at 536. And "personal property such as televisions, are personal 'effects' protected by the Fourth Amendment." Beaulieu v. Ludeman, Civil No. 07-CV-1535 (JMR/JSM), 2008 U.S. Dist. LEXIS 47513, 2008 WL 2498241, at * 15 (D. Minn. June 18, 2008).

Plaintiffs do not allege who specifically denied them the right to have the television, or who took their ring or their belt, nor do they allege when this **[*31]** purportedly took place. Accordingly, claims against the defendants in their individual capacities fail. However, this Court does not recommend at this stage that the claims against the defendants in their official capacities be dismissed.

4. Denial of Access to Legal Materials and Counsel

Plaintiffs' fifth cause of action alleges that defendants have restricted their access to the law library, that they both monitor and limit Plaintiffs' phone calls to their lawyers, and that MSOP reviews their legal mail outside their presence in ***violation*** of their constitutional rights. *Carey*, ECF No. 1 at ¶¶ 90, 114-122, 137-147; *McMoore*, ECF No. 1 at ¶¶ 89, 113-121, 136-146; *Pettis*, ECF No. 1 at ¶¶ 89, 113-121, 136-146; *Pittman*, ECF No. 1 at ¶¶ 89, 113-121, 136-146.

The Court views Plaintiffs' allegations regarding the limitations of the defendants' law library as "access-to-the-courts" claims. *See* White v. Kautzky, 494 F.3d 677, 679-80 (8th Cir. 2007). The Constitution "guarantees prisoners a right to access to the courts." *Id.* at 679. "For prisoners, meaningful access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from **[*32]** persons trained in the law." *Id.* (citing Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), *overruled on other grounds by* Lewis v. Casey, 518 U.S. 343, 354, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)). The phrase "adequate assistance from persons trained in the law refers to the adequacy of the prisoner's access to his or her court-appointed counsel or other law-trained assistant." *Id.* at 680 (citing Schrier v. Halford, 60 F.3d 1309, 1313-14 (8th Cir. 1995)). Although Plaintiffs are not prisoners, the Eighth Circuit has applied these same standards to access-to-the-court claims filed by civil detainees. *See* Beaulieu v. Ludeman, 690 F.3d 1017, 1037 (8th Cir. 2012) (discussing prison standards in considering access-to-the-court claims filed by civil detainee).

Plaintiffs describe multiple perceived inadequacies with the defendants' law library policies and the law library itself. Plaintiffs allege that they are limited to one hour per visit to the law library and those visits are irregular and subject to frequent last-minute cancelations. *Carey*, ECF No. 1 at ¶¶ 114-119; *McMoore*, ECF No. 1 at ¶¶ 114-119; *Pittman*, ECF No. 1 at ¶¶ 114-119; *Pettis*, ECF No. 1 at ¶¶ 114-119. Plaintiffs also allege that there is no one available to assist them in accessing the law library resources and that those resources themselves are inadequate, consisting in large part of materials donated by the detainees. *Carey*, ECF No. 1 at ¶¶ 121-122; *McMoore* **[*33]** , ECF No. 1 at ¶¶ 120-121; *Pittman*, ECF No. 1 at ¶¶ 120-121; *Pettis*, ECF No. 1 at ¶¶ 120-121.

These claims ultimately fail, however, because Plaintiffs do not allege that they suffered any actual injury or prejudice because of these alleged deficiencies. "To assert a successful claim for denial of meaningful access to the courts . . . an inmate must demonstrate that he suffered prejudice." Berdella v. Delo, 972 F.2d 204, 210 (8th Cir. 1992). Here, Plaintiffs fail to allege any facts suggesting that these policies adversely affected their claims in any pending (or resolved) lawsuits. *See* White, 494 F.3d at 680 (access to the court claims require a showing of actual injury, "that is, the hinderance of a nonfrivolous and arguably meritorious underlying legal claim").

The Court also considers Plaintiffs' claims regarding the handling of their legal mail in terms of their right to "access to the courts." *See* Gardner v. Howard, 109 F.3d 427 (8th Cir. 1997). In Gardner, the Eighth Circuit explained that

> [t]he act of opening incoming mail does not injure an inmate's right to access to the courts. The policy that incoming confidential legal mail should be opened in inmates' presence instead serves the prophylactic purpose of assuring them that confidential attorney-client mail has not been improperly read in the guise of searching for contraband. **[*34]**

Id. at 431. Here, therefore, "to assert a successful claim for denial of meaningful access to the courts . . . an inmate must demonstrate that he suffered prejudice from the inadvertent opening of legal mail." *Id.* (quoting Berdella v. Delo, 972 F.2d 204, 210 (8th Cir. 1992)). Because Plaintiffs fail to establish any facts suggesting that they were prejudiced from the opening of their legal mail, this Court recommends that this claim be

dismissed, as well.

Further, Plaintiffs' claim that MSOP limits their legal calls does not establish a cause of action under § 1983. The Eighth Circuit considered MSOP's policies on detainees' telephone access in Beaulieu, 690 F.3d at 1038-42. In that case, the Eighth Circuit concluded that MSOP's policy restricting legal calls to 30 minutes did not violate the constitution, id. at 1039, finding that the policy was reasonably related to a legitimate governmental interest of providing phone access to all patients, id. at 1041, and detainees had alternative methods of contacting their counsel, including mail and in-person visits, *id.* Recognizing that *Beaulieu* represents binding precedent, this Court recommends that this claim be dismissed.

Plaintiffs, however, further allege that they have no privacy when making telephone calls because the telephones are located where third **[*35]** parties, including MSOP staff, can overhear their conversations. *Carey*, ECF No. 1 at ¶¶ 137-147; *McMoore*, ECF No. 1 at ¶¶ 136-146; *Pettis*, ECF No. 1 at ¶¶ 136-146; *Pittman*, ECF No. 1 at ¶¶ 136-146. Plaintiffs claim that even though there are telephones in more private rooms, MSOP restricts their access to these phones. *Carey*, ECF No. 1 at ¶ 141; *McMoore*, ECF No. 1 at ¶ 140; *Pettis*, ECF No. 1 at ¶ 140; *Pittman*, ECF No. 1 at ¶ 140. Furthermore, Plaintiffs contend that the phone calls to their lawyers are themselves being monitored. *Carey*, ECF No. 1 at ¶ 142; *McMoore*, ECF No. 1 at ¶ 141; *Pettis*, ECF No. 1 at ¶ 141; *Pittman*, ECF No. 1 at ¶ 141. Plaintiffs offer limited factual support for this claim, claiming to "hear the clicking sound as the receiver was being picked up or hung up indicating that someone else was on the line." *Id.* The Court recommends that the claims against the defendants in their official capacities related to MSOP's policies of monitoring legal calls and the lack of privacy surrounding those calls survive preservice review.

5. Denial of Liberty in *Violation* of the Fifth and *Fourteenth Amendments to the United States Constitution* and *42 U.S.C. § 1983*

Plaintiffs' sixth cause of action alleges that the defendants have violated their constitutional **[*36]** right to liberty contrary to the Fourth, Fifth, Sixth and *Fourteenth Amendments to the Constitution* and *42 U.S.C. § 1983*. *Carey*, ECF No. 1 at p. 82; *McMoore*, ECF No. 1 at p. 88; *Pettis*, ECF No. 1 at p. 87; *Pittman*, ECF No. 1 at p. 88. This claim appears to have two parts: (1) Plaintiffs' contention that they have been unlawfully detained because the Minnesota Treatment and Commitment Act ("MCTA") is unconstitutional; and (2) Plaintiffs' claims that MSOP's policies amount to an unconstitutional restriction on their liberty interests. Both aspects of this claim fail as a matter of law.[12]

First, the United States Court of Appeals for the Eighth Circuit considered the constitutionality of the MCTA in *Karsjens v. Piper, 845 F.3d 394, 409-10 (8th Cir. 2017)* (*Karsjens I*), concluding that the "MCTA is facially constitutional because it is rationally related to Minnesota's legitimate interests." *Id. at 409*. Further, the Eighth Circuit rejected the plaintiffs' as-applied challenge to the MCTA, concluding that none of the "identified actions of the state defendants or arguable shortcomings in the MSOP were egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard." *Id. at 411*. This holding is determinative here. *See Cooper v. Federal Reserve Bank, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984 "*a judgment in a properly entertained class action is binding on **[*37]** class members in subsequent litigation."). Accordingly, Plaintiffs' claims regarding the constitutionality of the MCTA fail as a matter of law.

Second, Plaintiffs allege that a litany of MSOP policies constitute a denial of their liberty interest, including policies "denying them access to hot water for tea, coffee, or soup;" "denying them access to a microwave or hot pot;" "denying him access to recreational activities and exercise;" "restricting what they can purchase from the inmate store;" "denying [them] educational programming;" "denying them any meaningful employment opportunity;" "denying them access to new game systems;" "denying them access to meaningful hobbies;" "denying them access to either the big or small yard until [they were] committed;" "restricting the time [they are] allowed access to the yard;" "taking away the basic life skills of allowing clients to manage their personal finances;" "denying them the right to greet and shake hands with other treatment peers;" "denying them

[12] Pittman and Pettis also list "Denial of Liberty" as their twenty-first cause of action. *See Pittman*, ECF No. 1 at ¶¶ 276-78, *Pettis*, ECF No. 1 at ¶¶ 276-78. This Court sees no substantive difference between their twenty-first cause of action and their sixth cause of action, which also alleges denial of liberty. Accordingly, as noted above, this Court addresses their twenty-first cause of action alongside their sixth case of action, which is the same as the sixth cause of action in the complaints of McMoore and Carey. *Carey*, ECF No. 1 at p. 82; *McMoore*, ECF No. 1 at p. 88.

the right to share food;" "denying them the right to enjoy the basic life skills of learning technology;" "denying them the right to once a week outside support groups;" "implementing a prison **[*38]** curfew;" and "denying them the right to use the personal washing machines." *McMoore*, ECF No. 1 at ¶ 89; *Pittman*, ECF No. 1 at ¶ 89; *Pettis*, ECF No. 1 at ¶ 89; *Carey*, ECF No. 1 at ¶ 90.

The *Fourteenth Amendment's Due Process Clause* protects persons against "deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin, 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005)*. "A liberty interest may arise from the Constitution itself, by reason of the guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Id.* (internal citations omitted). "[T]he touchstone inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life." *Id. at 223*. The Eighth Circuit has applied this framework to due process claims advanced by civil detainees. *See Beaulieu, 690 F.3d at 1047* (rejecting plaintiff's claim that he had a liberty interest in having access to a legal computer).

Here, Plaintiffs have failed to establish that any of these policies infringe upon **[*39]** a recognized liberty interest.[13] The closest they get is arguing that the MCTA creates a liberty interest in requiring civilly committed detainees to receive adequate treatment. *See Carey*, ECF No. 1 at ¶ 191; *McMoore*, ECF No. 1 at ¶ 190; *Pettis*, ECF No. 1 at ¶ 190; *Pittman*, ECF No. 1 at ¶ 190. As noted above, however, the Court in *Karsjens I* rejected the argument that the Plaintiffs have a constitutional right to treatment. *Karsjens I, 845 F.3d at 410-11*. Because Plaintiffs identify no other property or liberty interest implicated by the myriad policies they challenge, this Court recommends that this claim be dismissed.

6. Denial of Less Restrictive Alternative

Plaintiffs' eighth cause of action fails for the same reasons as their first. Plaintiffs allege that the respective defendants have violated their right to a "less restrictive alternative placement" in ***violation*** of the United States and Minnesota constitutions. *See Carey*, ECF No. 1 at ¶¶ 238-40; *McMoore*, ECF No. 1 at ¶¶ 237-38; *Pettis*, ECF No. 1 at ¶¶ 237-239; *Pittman*, ECF No. 1 at ¶¶ 237-39.

The Eighth Circuit considered and rejected this claim in *Karsjens I*, finding no constitutional ***violation*** related to release from confinement or **[*40]** the availability of a less restrictive placement. *Karsjens I, 845 F.3d at 409-10* (concluding that the MCTA provides "proper procedures and evidentiary standards for a committed person to petition for a reduction in his custody or his release from confinement"). On remand, the district court also analyzed this claim as a conditions of confinement claim, concluding that "while not every MSOP Client may be able to access a least restrictive alternative, there is no evidence that the continuum of facilities that Defendants offer [amounts to punishment in ***violation*** of the *Fourteenth Amendment*]." *Karsjens, 2022 U.S. Dist. LEXIS 31842, 2022 WL 542467 at *4 n.5*. Accordingly, Plaintiffs' identical claim challenging the absence of less restrictive placement alternatives fails as well.[14]

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[13] To the extent that Plaintiffs are alleging an Equal Protection claim because, for example, inmates in the custody of the Department of Corrections are less restricted in their use of the "big yard," *Carey*, ECF No. 1 at ¶ 151; *McMoore*, ECF No. 1 at ¶ 150; *Pettis*, ECF No. 1 at ¶ 150; *Pittman*, ECF No. 1 at ¶ 150, any Equal Protection claim would likewise fail. "In order to establish an equal protection claim, a prisoner must show that he is treated differently from similarly-situated inmates and that the different treatment is based upon either a suspect classification or a 'fundamental right.'" *Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 815 (8th Cir. 2008)*. Courts in this district have held that detainees in one facility or unit are not similarly situated to detainees at other facilities or units for equal protection purposes. *Aune v. Ludeman, Civil No. 09-CV-0015 (JNE/SRN), 2010 U.S. Dist. LEXIS 1575, 2010 WL 145276, at *9 (D. Minn. Jan. 8, 2010)*; *Beaulieu v. Ludeman, Civil No. 07-CV-1535 (JMR/JSM), 2008 U.S. Dist. LEXIS 47513, 2008 WL 2498241, at *13*; *Jackson v. Wengler, No. Civil No. 07-CV-3587 (JRT/FLN), 2007 U.S. Dist. LEXIS 81474, 2007 WL 3275102, at *6 (D. Minn. Nov. 2, 2007)* (citing *Klinger v. Dept. of Corr., 31 F.3d 727, 731 (8th Cir. 1994)*. Thus, it cannot be said that prisoners are similarly situated to civil detainees. Therefore, any Equal Protection claim purporting to compare the two fails as a matter of law.

[14] Plaintiffs appear to urge the Court to apply the *McDonnell-Douglas* test to their claim alleging denial of a less restrictive alternative. *Carey*, ECF No. 1 at ¶ 182; *McMoore*, ECF No. 1 at ¶ 181; *Pittman*, ECF No. 1 at ¶ 181; *Pettis*, ECF No. 1 at ¶ 181. This is a reference to the framework federal courts use in considering employment discrimination lawsuits. *See*

7. Punishment

Plaintiffs' ninth cause of action alleges that they are being punished in ***violation*** of their right to be free from cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, section 2, 5, 6, and 7 of the Minnesota Constitution.[15] *Carey*, ECF No. 1 at p. 84; *McMoore*, ECF No. 1 at p. 90; *Pettis*, ECF No. 1 at p. 89; *Pittman*, ECF No. 1 at p. 90.

Plaintiffs list a number of examples of how they have been punished. Specifically, Plaintiffs allege that the defendants have punished them in retaliation for exercising **[*41]** their constitutional rights by "denying [them] meals, denying [them] the right to telephone [their] attorneys, denying [them] the right to request copies of written policies and procedures governing the operations of MSOP, locking [them] down and imposing punishment on [them]." *Carey*, ECF No. 1 at ¶ 56; *McMoore*, ECF No. 1 at ¶ 55; *Pettis*, ECF No. 1 at ¶ 55; *Pittman*, ECF No. 1 at ¶ 55. Plaintiffs also contend that punishment has included loss of "yard time," alleging that "on at least two other occasions, the exact dates of which [Plaintiffs] does not presently recall, Mr. Rose denied [them] access to the gym as punishment for some alleged or perceived ***violation*** of some rule or some other misbehavior." *McMoore*, ECF No. 1 at ¶ 67; *Pettis*, ECF No. 1 at ¶ 67; *Pittman*, ECF No. 1 at ¶ 67.[16] And that it has involved the removal of furniture from the common areas, including televisions. *Carey*, ECF No. 1 at ¶¶ 70-74; *McMoore*, ECF No. 1 at ¶¶ 69-73; *Pettis*, ECF No. 1 at ¶¶ 69-73; *Pittman*, ECF No. 1 at ¶¶ 69-73. Further, Plaintiffs claim that they are unfairly punished for the alleged infractions of other MSOP clients. *Carey*, ECF No. 1 at ¶ 58; *McMoore*, ECF No. 1 at ¶ 57; *Pettis*, ECF No. 1 at ¶ **[*42]** 57; *Pittman*, ECF No. 1 at ¶ 57.

Carey specifically describes an incident that took place on December 12, 2011, where he claims he received a behavioral expectations report (BER) because he is black and labeled as a civilly committed sex offender. *Carey*, ECF No. 1 at ¶ 52. Carey claims that he simply complimented a staff member on her "good looks," but the staff member reacted unreasonably. *Id.* at ¶ 53. Carey alleges that he was asking to speak with a supervisor, when Defendant "Seth Doe" acted "without cause or provocation by grabbing [him] from behind" and "without warning sprayed [him] with a chemical irritant in the face." *Id.* ¶ 54. Carey claims that Defendant Seth Doe's reaction was disproportionate to what the situation required and "exceeded the domain of legitimate professional judgment." *Id.* Carey further claims that he was subsequently transferred from St. Peter out of retaliation, without any finding of guilt "simply to corroborate and create a story to file criminal charges." *Id.* at ¶ 55.

As civil detainees, courts consider such claims under the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment. *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). To be sure, "[n]either pretrial detainees nor civilly committed individuals may be punished without running afoul **[*43]** of the Fourteenth Amendment." Karsjens II, 988 F.3d at 1052 (citing Bell, 441 U.S. at 535). Yet, there is a "distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may be." Bell, 441 U.S. at 537. At this stage of the proceedings, this Court cannot determine as a matter of law which side of the line these forms of punishment land. Accordingly, this Court does not recommend that Plaintiffs' ninth cause of action be dismissed against the defendants in their official capacities. Further, as noted above, this Court does not recommend that Carey's claim against Defendant Seth Doe in his individual capacity or Plaintiffs' claim against Rob Rose, Julie Rose, and Terry Kneisel in their individual capacities be dismissed.

This does not end the discussion, however, because, as the Court understands it, Plaintiffs' eleventh cause of action alleges that they were punished without due

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Plaintiffs' claims do not concern allegations about employment discrimination. Accordingly, *McDonnel Douglas* is inapposite and this Court declines to accept the Plaintiffs' invitation.

[15] To the extent that Plaintiffs reference alleged ***violations*** of the Minnesota Constitution throughout their complaints, this Court recommends that such claims be dismissed because "there is no private cause of action for ***violations*** of the Minnesota Constitution." Eggenberger v. West Albany Twp., 820 F.3d 938, 941 (8th Cir. 2016) (quoting Guite v. Wright, 976 F. Supp. 866, 871 (D. Minn. 1997)).

[16] Although Carey names Julie Rose as a defendant, he similarly alleges that "Mr. Rose denied [him] access to the gym as punishment for some alleged or perceived ***violation*** of some rule or some other misbehavior." ECF No. 1 at ¶ 68. Perhaps this is a typographical error, perhaps not, but, as noted below, the distinct similarities across the four Complaints leads the Court to question whether Julie Rose and Rob Rose are the same person.

process of law. *Carey*, ECF No. 1 at ¶ 51; *McMoore*, ECF No. 1 at ¶ 54; *Pettis*, ECF No. 1 at ¶ 54; *Pittman*, ECF No. 1 at ¶ 54. Specifically, Plaintiffs contend that they were not informed of the reasons for their punishment or provided with notice or the opportunity to be heard. *Id.* The Court views this as a procedural **[*44]** due process claim, which is reviewed in two-steps. *Senty-Haugen v. Goodno, 462 F.3d 876, 886 (8th Cir. 2006)*. The first question is whether the plaintiff has been deprived of a protected liberty or property interest. *Id.* If the answer is yes, the court then considers "what process is due by balancing the specific interest that was affected, the likelihood that the Offender Program procedures would result in erroneous deprivation, and the Offender Program interest in providing the process that it did, including the administrative costs and burdens of providing additional process." *Id.* (citing *Mathews v. Eldridge, 424 U.S. 319, 332-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*). This is a fact-intensive analysis. Thus, here, again, at this stage in the proceedings, this Court does not recommend that Plaintiffs' procedural due process claim be dismissed.

8. To Be Free From Double Jeopardy, and the Prohibition Against Preventive Detention

In addition to challenging the conditions of their confinement, the Plaintiffs also take aim at the fact of their confinement, alleging that their commitments themselves violate their right to be free from double jeopardy—Plaintiffs' tenth cause of action. *Carey*, ECF No. 1 at p. 85; *McMoore*, ECF No. 1 at p. 91; *Pettis*, ECF No. 1 at p. 90; *Pittman*, ECF No. 1 at p. 90. This claim fails.

As the **[*45]** Court understands it, Plaintiffs allege that their continued confinement violates their right to be free from double jeopardy because Plaintiffs have already been convicted and served a prison sentence on underlying criminal offenses. This claim, however, is barred by the favorable termination rule articulated in *Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)*.

In *Heck*, the Supreme Court held that

> [i]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a *[42 U.S.C.] § 1983* plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under *§ 1983*.

512 U.S. at 486-87 (footnote and citation omitted). Put another way, pursuant to *Heck*, a detainee cannot maintain a civil lawsuit that, if successful, would necessarily invalidate his continued confinement. *Heck*, moreover, applies to situations such as this where the plaintiffs **[*46]** are being held pursuant to a civil commitment order rather than a prison sentence. *See Nicolaison v. County of Hennepin, 2017 U.S. Dist. LEXIS 216447, 2017 WL 8944029, at *2 (D. Minn. Dec. 12, 2017), report and recommendation adopted by 2018 U.S. Dist. LEXIS 14027, 2018 WL 582476 (D. Minn. Jan. 29, 2018)* (listing cases); *Coffman v. Blake, 156 F. App'x 863 (8th Cir. 2005)* (per curiam). The principles of *Heck* apply here because finding that the Plaintiffs' continued detention violates Double Jeopardy would certainly call into question the legality of that detention. Accordingly, unless or until the Plaintiffs successfully invalidate their continued detention through some other procedural mechanism, they cannot seek relief here on a claim premised on that purportedly unlawful confinement.

Similarly, Plaintiffs' twenty-second cause of action claims that their continued detention under the MCTA constitutes unconstitutional "preventative [sic] detention." *Carey*, ECF No. 1 at p. 91; *McMoore*, ECF No. 1 at p. 97; *Pettis*, ECF No. 1 at p. 96; *Pittman*, ECF No. 1 at p. 97. Yet, here, again, this claim runs afoul of *Heck*. If this Court were to find that Plaintiffs' continued commitment constitutes unlawful preventive detention, this would necessarily call into question the legality of their detention. Further, as previously noted, the Eighth Circuit has previously held that the MCTA is constitutional. *Karsjens I, 845 F.3d at 409-411*. Accordingly, the Court recommends **[*47]** that this claim be dismissed, as well.

9. Conspiracy

Plaintiffs McMoore and Carey's twenty-first cause of action alleges a "conspiracy to place plaintiff outside the law in ***violation*** of the 1st, 5th, and *14th Amendments to the United States Constitution* and *42. U.S.C. § 1985(3)*." *Carey*, ECF No. 1 at p. 90; *McMoore*, ECF No.

1 at 97.[17] Similarly, the twelfth cause of action in all four complaints is titled, "conspiracy to deny due process in ***violation*** of the 14th Amendment of the United States Constitution and 42 U.S.C. § 1985(3)." *Carey*, ECF No. 1 at p. 86; *McMoore*, ECF No. 1 at p. 92; *Pettis*, ECF No. 1 at p. 91; *Pittman*, ECF No. 1 at p. 91-92.

Both these causes of action allege a conspiracy. Indeed, to state a claim under the equal protection provision of 42 U.S.C. §1985(3), Plaintiffs must allege: "(1) a conspiracy, (2) for the purpose of depriving another of the 'equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) and injury to a person or property, or the deprivation of a legal right." Federer v. Gephardt, 363 F.3d 754, 757-58 (8th Cir. 2004) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102-03, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)).

Here, these causes of action fail because Plaintiffs do not plead sufficient facts to establish a conspiracy claim. A conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." Faulk v. City of St. Louis, Missouri, 30 F.4th 739, 748 (8th Cir. 2022) (quoting Twombly, 550 U.S. at 556 **[*48]**). Aside from conclusory allegations that the defendants "conspired" against the plaintiffs' "right to receive rehabilitation," *McMoore*, ECF No. 1 at ¶ 184, *Carey*, ECF No. 1 at ¶ 185, Plaintiffs fail to plead any specific, particularized facts suggesting that there was a meeting of the minds. Plaintiffs contend that "[d]uring the 2011 Legislative session the former DHS Commissioner Cal Ludeman was recently caught 'hiding' important documents . . . that would support plaintiff's claim of conspiracy to interfere with his rights." *Id.* Plaintiffs, however, do not even identify what those documents are, what they purport to contain, or with whom he was allegedly conspiring that would shed light on this alleged conspiracy. In *Karsjens I*, moreover, the Eighth Circuit explained that although "the Supreme Court has recognized a substantive due process right to reasonably safe custodial conditions, it has not recognized a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." 845 F.3d at 410 (quoting Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012). Thus, even if the Plaintiffs established a conspiracy, the Plaintiffs cannot establish that there was a conspiracy to deprive them of their right to treatment, because there is no such federally recognized right. Accordingly, the conspiracy claims in the twelfth and twenty-first causes of action should be dismissed.

Having dispensed with the conspiracy part of Carey and McMoore's twenty-first cause of action,[18] the Court now turns to their allegation that the defendants' have placed them "outside of the law." In support of this claim, Plaintiffs Carey and McMoore contend, in a wholly conclusory fashion, that "they cannot obtain any statutory relief through the Department of Human Rights under M.S. 343A," and that the defendants have acted to deny them their federally protected rights under "42 U.S.C. § 2000a. Prohibition against discrimination to redress the deprivation of services, Americans with Disabilities Act of 1990, § 2 *et seq.*, 42 U.S.C. § 12101 et seq., and Rehabilitation Act of 1973, § 504(a), as amended, 29 U.S.C. § 794(a)." *Carey*, ECF No. 1 at ¶¶ 187-188; *McMoore*, ECF No. 1 at ¶¶ 186-187. These allegations are nothing more than conclusory and, as such, do not establish a plausible **[*49]** cause of action. Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Accordingly, this Court recommends that these claims be dismissed.[19]

10. Obligation of Contracts

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[17] As previously noted, the Court sees no discernable difference in Plaintiffs Pettis and Pittman's twenty-first cause of action—denial of liberty—and the sixth cause of action in all four complaints, which is also titled, in part, "denial of liberty." *Pettis*, ECF No. 1 at p. 96; *Pittman*, ECF No. 1 at p. 96. Accordingly, in addressing the sixth cause of action, this Court is also dispensing with Pettis and Pittman's twenty-first cause of action.

[18] Plaintiffs Carey and McMoore's claim alleging that this purported conspiracy violates the First, Fifth, and Fourteenth Amendments should likewise fail. First, as noted above, the Plaintiffs have failed to plead sufficient facts to establish a "conspiracy." Second, they have failed to plead any facts suggesting that any such conspiracy violates some federally recognized constitutional right.

[19] Here, again, although Plaintiffs Pittman and Pettis do not explicitly articulate a cause of action alleging that the defendants "placed [them] outside the law," they make these claims throughout their complaints, citing the same litany of federal statutes in support. *Pettis*, ECF No. 1 at ¶¶ 187-187; *Pittman*, ECF No. 1 at ¶¶ 186-187. To the extent that Plaintiffs Pettis and Pittman intended for such allegations to provide factual support to their sixth cause of action alleging "denial of liberty," this Court recommends that the claim fail for the same reasons outlined above.

Plaintiffs' fifteenth cause of action claims that the defendants have violated the Contracts Clause of the United States and Minnesota Constitutions. *Carey*, ECF No. 1 at p. 87; *McMoore*, ECF No. 1 at p. 93; *Pettis*, ECF No. 1 at p. 93; *Pittman*, ECF No. 1 at p. 93.

Assuming without deciding that a cause of action for an alleged Contacts Clause ***violation*** may be brought under 42 U.S.C. § 1983, this claim nevertheless fails. *See* Heights Apartments, LLC v. Walz, 30 F.4th 720, 727 (8th Cir. 2022) (discussing that the Eighth Circuit has never expressly decided whether an alleged ***violation*** of the Contract Clause may be brought under § 1983). The Contract Clause of the United States Constitution "forbids states from interfering with contractual obligations." U.S. Const. art. I, § 10, cl. 1. Here, although Plaintiffs are not explicit about which contract is at issue, they allege at various points in their Complaints that the defendants are in breach of their "treatment contract." *See Pettis*, ECF No. 1 at ¶ 42, p. 98; *McMoore*, ECF No. 1 at ¶ 42, p. 99; *Pittman*, ECF No. 1 at ¶ 42, p. 98; *Carey*, ECF No. 1 at ¶ 39, p. 93. Having searched the Complaints and finding no other plausible grounds to allege a ***violation*** of contract, this Court examines whether these allegations are sufficient to establish a Contracts Clause ***violation***, concluding that they **[*50]** do not.

Plaintiffs allege that even though their respective committing courts ordered that the defendants offer them treatment, they initially did not receive any treatment and when they did receive treatment, it was inadequate and substandard. *See Pettis*, ECF No. 1 at ¶ 42; *McMoore*, ECF No. 1 at ¶ 42; *Pittman*, ECF No. 1 at ¶ 42; *Carey*, ECF No. 1 at ¶ 39. Claims alleging ***violations*** of the Contracts Clause involve a three-step inquiry: "(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?" Koster v. City of Davenport, Iowa, 183 F.3d 762, 766 (8th Cir. 1999). "If a substantial impairment of a contractual relationship exists, the legislation nonetheless survives a constitutional attack if the impairment is . . . justified as reasonable and necessary to serve an important public purpose." *Id.* (internal quotations omitted).

The principal problem with this claim is that a Contract Clause ***violation*** alleges improper government interference with a contract. *See, e.g.,* Heights Apartments, LLC, 30 F.4th at 728 (applying a two-prong test to determine whether a *state* has impermissibly interfered with a contract). Here, assuming, for the sake of argument, that Plaintiffs' original civil commitment order established a contractual relationship, **[*51]** this relationship was between the state and the Plaintiff. Further, Plaintiffs do not allege that there was a change in the law that altered this contractual relationship; rather, they claim that the state has not fulfilled its responsibilities under the contract pursuant to Minnesota law. Accordingly, the Plaintiffs have not established sufficient facts to establish a Contracts Clause ***violation***. Thus, this claim should be dismissed.

11. Totality of the Conditions

Plaintiffs' seventeenth cause of action alleges that the totality of their conditions violate their rights under Fourteenth Amendment. *Carey*, ECF No. 1 at p. 88-89; *McMoore*, ECF No. 1 at p. 95; *Pettis*, ECF No. 1 at p. 94; *Pittman*, ECF No. 1 at p. 94. This Court views this as a conditions of confinement claim. In *Karsjens II*, the Eighth Circuit clarified that the standard set forth in Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) "applies equally to conditions of confinement claims brought by pretrial detainees and civilly committed individuals, as neither group may be punished." Karsjens II, 988 F.3d at 1053.

Pursuant to *Bell*, the government "may subject [pretrial detainees] to the restrictions and conditions of a detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." **[*52]** Bell v. Wolfish, 441 U.S. 520, 536-37, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). There are two ways to determine whether conditions of confinement rise to the level of punishment. First, "a plaintiff could show that the conditions were intentionally punitive." Id. at 538. Alternatively, "if there is no expressly demonstrated intent to punish, the plaintiff could also show that the conditions were not reasonably related to a legitimate government purpose or were excessive in relation to that purpose." Id. 538-39.

Pretrial detainees "are entitled to reasonably adequate sanitation, personal hygiene, particularly over a lengthy course of time." Beaulieu v. Ludeman, 690 F.3d 1017, 1045 (8th Cir. 2012). However, "[n]ot every disability imposed during pretrial detention amounts to punishment in the constitutional sense." Smith v. Copeland, 87 F.3d 265, 268 (8th Cir. 1996). "There is a de minimis level of imposition with which the Constitution is not concerned." *Id.* "In considering whether the conditions of pretrial detention are unconstitutionally punitive, [courts] review the totality of

the circumstances of a pretrial detainee's confinement." *Morris v. Zefferi, 601 F.3d 805, 810 (8th Cir. 2010)*. Because a conditions of confinement claim is a fact-intensive inquiry, at this stage of the proceedings, this Court does not recommend that Plaintiffs' "totality of conditions" claim be dismissed.

12. Supervisor Liability

Listing all the named defendants **[*53]** in their respective Complaints, Plaintiffs' eighteenth cause of action alleges that each is responsible for the alleged deficiencies of his/her subordinates. *Carey*, ECF No. 1 at 89; *McMoore*, ECF No. 1 at 95; *Pettis*, ECF No. 1 at p. 94-95; *Pittman*, ECF No. 1 at p. 95. This claim should fail.

Liability in a *§ 1983* case is personal. *See Frederick v. Motsinger, 873 F.3d 641, 646 (8th Cir. 2017)*. Put differently, "government officials are personally liable only for their own misconduct." *S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015)*. Respondeat superior—the theory that a supervisor is responsible for the torts of his subordinates—is not a basis for liability under *42 U.S.C. § 1983*. *Keeper v. King, 130 F.3d 1309, 1314 (8th Cir. 1997)* (quoting *Kulow v. Nix, 28 F.3d 855, 858 (8th Cir. 1994)*). Instead, for a supervisor to be liable under *§ 1983* on a theory of "failure to supervise or failure to train," the plaintiff must show that the supervisor's "failure to supervise and train amounts to deliberate indifference to the rights of the persons with whom [the tortfeasor] came into contact." *Doe v. Fort Zumwalt R-II School Dist., 920 F.3d 1184, 1189 (8th Cir. 2019)* (quoting *City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)*.

Deliberate indifference, moreover, is a "stringent standard of fault." *Id.* (quoting *Board of Cty. Comm'rs v. Brown, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)*). "A pattern of similar constitutional ***violations*** . . . is 'ordinarily necessary' to demonstrate deliberate indifference . . . ." *Id.* (quoting *Connick v. Thompson, 563 U.S. 51, 62, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)*). Alternatively, a plaintiff may show that "the need for more supervision or training was so **[*54]** obvious, and the inadequacy so likely to result in the ***violation*** of constitutional rights, that the policymakers [ ] can reasonably be said to have been deliberately indifferent to the need." *Id.* (quoting *Canton, 489 U.S. at 389*). In either case, the supervisors' failure to train or supervise must be "the moving force behind the constitutional ***violation***." *Id.*

Plaintiffs' Complaints are replete with blanket assertions that supervisors "knew or should have known" about the purported constitutional deficiencies at MSOP. *See, e.g., McMoore*, ECF No. 1 at ¶ 57 (alleging that all defendants, including Governor Dayton and Attorney General Lori Swanson, "knew or should have known" about a lockdown incident "and approved it or failed to stop it"). Such conclusory statements, however, are simply insufficient to state a plausible claim of supervisory liability. *See Twombly, 550 U.S. at 555* (to survive a motion to dismiss, a plaintiff's obligation to provide the "grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

Plaintiffs' next best effort at establishing a cause of action under *§ 1983* for "failure to train or supervise" is their state-law claim—itself **[*55]** conclusory, as explored below—that the defendants were negligent with respect to hiring practices at MSOP. *Carey*, ECF No. 1 at p. 88; *McMoore*, ECF No. 1 at p. 94; *Pettis*, ECF No. 1 at p. 93; *Pittman*, ECF No. 1 at 94. But "[d]eliberate indifference is characterized by obduracy or wantonness—it cannot be predicated on negligence, inadvertence, or good faith error." *Reilly v. Vadlamudi, 680 F.3d 617, 624 (6th Cir. 2012)*. Nothing alleged in the complaint rises to the level of deliberate indifference in supervisory practices. Accordingly, it is recommended that this claim be dismissed.

13. *Violation* of the Police Powers of the State

Plaintiffs' nineteenth cause of action alleges that the defendants are abusing the "parens patriae powers" of the state in ***violation*** of the *Tenth Amendment to the United States Constitution*. *See, e.g., Pittman*, ECF No. 1 at ¶¶ 270-272.

"Parens patriae is a common-law standing doctrine that permits the state to commence an action to protect a public interest, like the safety, health, or welfare of its citizens." *Lynch v. National Prescription Adm'rs, Inc., 787 F.3d 868, 872 (8th Cir. 2005)* (internal quotation omitted). Further, "[t]o invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population." *Id.*

This doctrine does not **[*56]** apply here. The Minnesota attorney general is named as a defendant in this action, not the other way around. Since the Minnesota attorney

general has not invoked the parens patriae doctrine, there is no basis for a claim alleging an abuse of that doctrine. Accordingly, this Court recommends that this claim be dismissed, as well.

14. *Violation of the Oath* of *Office*

Plaintiffs' twentieth claim is that former Minnesota Attorney General Lori Swanson and former Minnesota Governor Mark Dayton have violated their ***oaths*** of ***office*** in ***violation*** of *Article VI, clause 3 of the United States Constitution*. *Carey*, ECF No. 1 at p. 90; *McMoore*, ECF No. 1 at p. 96; *Pettis*, ECF No. 1 at p. 95-96; *Pittman*, ECF No. 1 at p. 96.

Article VI, clause 3 of the United States Constitution provides "[t]he Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by ***oath*** or affirmation, to support this Constitution." *U.S. Const., Art. VI, cl. 3*. Here, Plaintiffs appear to claim that Dayton and Swanson violated their ***oaths*** of ***office*** by defending the constitutionality of Minnesota's civil commitment scheme, and, specifically, the provisions that allow for indefinite detention. This claim fails, however, **[*57]** for at least two reasons.

First, as previously noted, Minnesota's commitment proceedings are constitutional. *Karsjens I, 845 F.3d at 410-11* (concluding that MCTA is constitutional on its face and as-applied). Second, and more to the point, the ***oaths*** that government officials take in assuming their ***office*** do not create a private cause of action. *See, e.g., Caldwell v. Obama, 6 F. Supp. 3d 31, 47 (D.D.C 2013)* (listing cases). Accordingly, this Court recommends that this claim be dismissed as a matter of law.

15. Denial of Health Care and Affordable Housing

Plaintiffs allege that the defendants violated their right to health care and affordable housing in ***violation*** of the Fifth and *Fourteenth Amendments to the United States Constitution* and Article 1, sections 2, 5, 6, and 7 of the Minnesota Constitution.[20] This claim—their twenty-third cause of action—should likewise fail. *Carey*, ECF No. 1 at p. 91-92; *McMoore*, ECF No. 1 at p. 98; *Pettis*, ECF No. 1 at p. 97; *Pittman*, ECF No. 1 at p. 97.

As a preliminary matter, Plaintiffs have not plead any facts alleging that they have been denied affordable housing. Indeed, the only mention of "affordable housing" in the Plaintiffs' Complaints is in the same breath as the allegation that they have been denied it. *Carey*, ECF No. 1 at ¶ 283; *McMoore*, ECF No. 1 at ¶ 282; *Pettis*, ECF No. 1 at ¶ 282; *Pittman*, ECF No. 1 at ¶ 282. Although pro se complaints **[*58]** are to be liberally construed, they still must allege sufficient facts to support the claims advanced. *Stone v. Harry, 364 F.3d 912, 915 (8th Cir. 2004)*. Accordingly, this claim should fail.

As to Plaintiffs' claim that they have been denied their right to health care, to establish an "inadequate medical care claim" under *§ 1983*, a civil detainee must show "deliberate indifference to a serious illness or injury." *Karsjens, 2022 U.S. Dist. LEXIS 31842, 2022 WL 542467, at *5 (D. Minn. Feb. 23, 2022)* (citing *Senty-Haugen v. Goodno, 462 F.3d 876, 889-90 (8th Cir. 2006)*). "Deliberate indifference is a higher standard than gross negligence, and a plaintiff must prove that officials new about excessive risks to his health but disregarded them, and that their unconstitutional actions in fact caused his injuries." *Id.* Moreover, "a plaintiff who alleges that a delay in treatment constitutes a constitutional deprivation must produce medical evidence to establish that the delay had a detrimental effect." *Id.*

Here, all four Plaintiffs allege that the defendants failed to timely provide them with a medical treatment for their eye conditions. *Carey*, ECF No. 1 at ¶ 156; *McMoore*, ECF No. 1 at ¶ 155; *Pettis*, ECF No. 1 at ¶ 155; *Pittman*, ECF No. 1 at ¶ 155.[21] Their medical indifference claim fails, however, because they do not allege that the delay in treatment caused them any injury. Further, although **[*59]** all four Plaintiffs contend that MSOP's policy of requiring staff to be present in the examination room is embarrassing and humiliating and therefore discourages them from seeking medical attention, they do not allege that they have been deprived treatment or that the deprivation of medical treatment caused them injury. *Carey*, ECF No. 1 at ¶ 157; *McMoore*, ECF No. 1 at ¶ 156; *Pettis*, ECF No. 1 at ¶ 156; *Pittman*, ECF No. 1

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[20] As a reminder, because "there is no private cause of action for ***violations*** of the Minnesota Constitution," *Eggenberger v. West Albany Twp., 820 F.3d 938, 941 (8th Cir. 2016)* (quoting *Guite v. Wright, 976 F. Supp. 866, 871 (D. Minn. 1997)*), *all* claims alleging a ***violation*** of the Minnesota Constitution fail as a matter of law.

[21] All four Plaintiffs appear to suffer from a very similar eye condition.

at ¶ 156. Accordingly, this claim should be dismissed, as well.

C. State Law Causes of Action

In addition to claims alleging ***violations*** of 42 U.S.C. § 1983, Plaintiffs allege various ***violations*** of Minnesota state law. These claims are addressed, in turn.

1. Invasion of Privacy

Plaintiffs allege a ***violation*** of the common-law tort of invasion of privacy. Minnesota recognizes three of the four causes of action that comprise of the tort generally referred to as "invasion of privacy:" intrusion upon seclusion, appropriation, and publication of private facts. Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233, 235 (Minn. 1998). Plaintiffs do not specify which of these causes of action they are alleging. Because Plaintiffs fail to allege sufficient facts to sustain any of these causes of action, Plaintiffs' claim alleging invasion of privacy fails as a matter **[*60]** of law.

Taking each cause of action in reverse order: "Publication of private facts is an invasion of privacy when one gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Lake, 582 N.W.2d at 233. Here, the inquiry does not go past step one: the Plaintiffs fail to allege any facts suggesting that the respective defendants publicized any personal information about their private lives. Indeed, the Complaints themselves are almost entirely devoid of any personal, identifying information about the Plaintiffs. Accordingly, Plaintiffs have not established a cause of action for publication of private facts.

Likewise, appropriation "protects an individual's identity and is committed when one appropriates to his own use or benefit the name or likeness of another." Lake, 582 N.W.2d at 233. There are no facts here alleging that the respective defendants appropriated or assumed for their own benefit the Plaintiffs' likeness. This claim fails.

This leaves intrusion upon seclusion. This cause of action "occurs where one intentionally intrudes, physically or otherwise, upon the **[*61]** solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." *Id.* The tort has three elements: "(a) an intrusion; (b) that is offensive; and (c) into some matter in which a person has a legitimate expectation of privacy." Swarthout v. Mut. Serv. Life Ins. Co., 632 N.W.2d 741, 744 (Minn. Ct. App. 2001). Undoubtedly, the Plaintiffs would contend that MSOP policies on room searches and strip searches constitute a cause of action for intrusion upon seclusion because they have a legitimate expectation of privacy in their bodies and living quarters and such intrusions are offensive. This argument, however, is unavailing.

As noted elsewhere, courts consider the reasonable expectation of privacy of the civilly committed under the same standard articulated for pretrial detainees. *See Arnzen v. Palmer*, 713 .3d 369, 373-73 (8th Cir. 2013). Under Eighth Circuit precedent, pretrial detainees have no reasonable expectation of privacy in their jail cells. United States v. Hogan, 539 F.3d 916, 923 (8th Cir. 2008). Accordingly, by analogy, civilly committed persons do not have a reasonable expectation of privacy in their rooms. Because there is no reasonable expectation of privacy in their rooms, a search of that room does not satisfy the third element of the intrusion upon seclusion cause of action.

Turning **[*62]** to strip searches, Plaintiffs contend that MSOP policies require clients to be strip searched before and after being transported—for example, to medical appointments—and after visitations. *Carey*, ECF No. 1 at ¶¶ 90, 123-124; *McMoore*, ECF No. 1 at ¶¶ 89, 122-123; *Pettis*, ECF No. 1 at ¶¶ 89, 122-123; *Pittman*, ECF No. 1 at ¶¶ 89, 122-123. As noted earlier, the district court in *Karsjens* considered these policies and concluded that they did not violate the plaintiffs' Fourth Amendment right against unreasonable searches. Karsjens, 336 F. Supp. 3d at 994-96. Consistent with this holding, therefore, it cannot reasonably be concluded that the Plaintiffs have a legitimate expectation of privacy in avoiding the strip searches in the specific instances described in Plaintiffs' Complaints. Accordingly, Plaintiffs' invasion of privacy state-tort claim should be dismissed.

2. Intentional Infliction of Emotional Distress

Plaintiffs' thirteenth cause of action alleges that defendants' conduct constitutes intentional infliction of emotional distress. This claim also fails.

The state tort of intentional infliction of emotional distress requires proof that: "(1) the conduct complained of was extreme and outrageous; (2) the conduct was

intentional or reckless; **[*63]** (3) the conduct caused emotional distress; (4) and the distress suffered was severe." *Kelly v. City of Minneapolis, 598 N.W.2d 657, 663 (Minn. 1999)* (citing Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 438-39 (Minn. 1983)). The tort "is sharply limited to cases involving particularly egregious facts." Langeslag v. KYMN Inc., 664 N.W.2d 860, 864 (Minn. 2003).

Even if Plaintiffs' allegations concerning the conditions of confinement at MSOP satisfied the first two elements, Plaintiffs' claim nevertheless fails because Plaintiffs do not allege any particularized facts suggesting that MSOP's policies or conditions of confinement caused them emotional distress or that the distress they suffered was severe. *See* Langeslag, 664 N.W.2d at 868 ("Just as the plaintiff must meet a high threshold of proof in proving the extreme nature of conduct, the plaintiff must also meet a high threshold of proof regarding the severity of the mental distress."). Minnesota has adopted the following definition of severe emotional distress: "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id. at 869* (citing Hubbard, 330 N.W.2d at 439). Here, Plaintiffs merely allege that defendants' conduct caused them "extreme emotional distress," *Carey*, ECF No. 1 at ¶ 254; *McMoore*, ECF No. 1 at ¶ 253; *Pettis*, ECF No. 1 at ¶ 253; *Pittman*, ECF No. 1 at ¶ 253. Such conclusory allegations are not sufficient **[*64]** to sustain a cause of action. Accordingly, this claim fails.

3. Negligent Infliction of Emotional Distress

Plaintiffs' fourteenth cause of action—negligent infliction of emotional distress—is a first cousin of their thirteenth cause of action—intentional infliction of emotional distress.

A plaintiff may recover for the state-tort negligent infliction of emotional distress "only when that plaintiff is within a zone of danger of physical impact, reasonably fears for his or her own safety, and consequently suffers severe emotional distress with resultant physical injury." Yath v. Fairview Clinics, N.P., 767 N.W.2d 34, 46 (Minn. Ct. App. 2009) (quoting Bohdan v. Alltool Mfg., Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987), *review denied* (Minn. Nov. 13, 1987)). Minnesota courts have "limited the zone of danger analysis to encompass plaintiffs who have been in some actual personal physical danger cause by defendant's negligence." K.A.C. v. Benson, 527 N.W.2d 553, 558 (Minn. 1995).

Here, again, Plaintiffs allege no facts suggesting that they were in physical danger due to the defendants' negligence. A remote possibility of personal peril, moreover, "is insufficient to place plaintiff within a zone of danger for the purposes of a claim of negligent infliction of emotional distress." *Id. at 559* (holding that plaintiff failed to establish a claim for negligent infliction of emotional distress **[*65]** where plaintiff was not actually exposed to HIV and thus was not in personal danger of physically contracting HIV).

An "exception to the zone of danger rule is that a plaintiff may recover damages for mental anguish or suffering for a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct." Bohdan v. Alltool Mfg., Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987). The Court need not determine whether this exception applies here, however, because plaintiffs have failed to establish "severe emotional distress with attendant physical manifestations, the third required element of the claim for negligent infliction of emotional distress." Aromashodu v. Swarovski North America Limited, 981 N.W.2d 791, 2022 Minn. App. LEXIS 137, 2022 WL 16544381, at *6 (Minn. Ct. App. Oct. 31, 2022). Again, Plaintiffs' Complaints are completely devoid of any facts suggesting that they have experienced severe emotional distress as a result of defendants' actions, let alone any facts suggesting that they have experienced physical manifestations of this severe emotional distress. Accordingly, this claim should fail, as well.

4. Negligent Hiring and Credentialing

Plaintiffs allege that defendants have been "negligent in hiring and credentialing MSOP staff." *Carey*, ECF No. 1 at ¶ 199; *McMoore*, ECF No. 1 at ¶ 198; *Pettis*, ECF No. 1 at ¶ 198; *Pittman*, ECF No. 1 at **[*66]** ¶ 198. Negligent hiring and negligent credentialing are state tort claims.

In Minnesota, "[n]egligent-hiring claims are . . . predicated on the fact that it should be foreseeable that an employee posed a threat of physical injury to others." Johnson v. Peterson, 734 N.W.2d 275, 277 (Minn. Ct. App. 2007). "Negligent hiring does not rely on the scope of employment, but rather on the risks created by exposing members of the public to potentially dangerous individuals." *Id. at 277-78* (internal quotations omitted). Thus, "a complaint for negligent hiring must allege that it was foreseeable either that the employee posed a threat of physical injury or that the employee inflicted physical injury." *Id.*

Here, this claim fails as a matter of law because Plaintiffs McMoore, Pittman, and Pettis do not allege any physical injury or that any MSOP staff was violent or posed a threat of physical injury. Even though they allege that they have suffered emotional distress due to MSOP's policies and procedures, "emotional distress is not a physical injury." *Id.* at 278.

Plaintiff Carey comes closest to establishing a cause of action for negligent hiring in alleging that Seth Doe "physically attacked" him. *Carey*, ECF No. 1 at ¶¶ 31 & 53-54. But to establish liability under the theory **[*67]** of "negligent hiring," the employer must "know[] or should have known that the employee was violent or aggressive and might engage in injurious conduct." *Johnson, 734 N.W.2d at 278* (quoting *Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993)*). Here, Carey does not plead any facts suggesting that Seth Doe's supervisors knew or should have known that Seth Doe was violent or aggressive. Thus, the negligent-hiring claim should be dismissed.

Plaintiffs also present a claim of negligent credentialing under Minnesota law. While Minnesota law recognizes a cause of action predicated upon negligent credentialing, *see generally Larson v. Wasemiller, 738 N.W.2d 300 (Minn. 2007)*, Plaintiffs do not establish a cause of action for "negligent credentialing" here. Plaintiffs do not allege that any of the defendants to these actions have "credentialed" anyone or that they are responsible for "credentialing" anyone. In fact, the allegations in support of these claim are scant. Rather, the complaint appears to be that the defendants are not credentialed at all. Since this appears to be the allegation, then it stands to reason that no one can be held liable—and certainly none of the named defendants—for having negligently credentialed those persons. Accordingly, this claim should likewise fail.

D. Injunctive Relief

Pittman, Pettis, **[*68]** and McMoore have also filed motions for preliminary injunctive relief. *McMoore*, ECF No. 4; *Pettis*, ECF No. 5; *Pittman*, ECF No. 2. For the reasons outlined below, this Court recommends that those motions be denied.

Rule 65 of the Federal Rules of Civil Procedure addresses motions for injunctive relief, including motions for temporary restraining orders ("TROs") and preliminary injunctions. *Fed. R. Civ. P. 65(a)-(b)*. In determining whether to grant a request for injunctive relief, courts consider the following factors:[22] (1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest. *Dataphase Systems, Inc. v. C. L. Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)* (en banc); *see also Minnesota Mining and Mfg. Co. v. Rauh Rubber, Inc., 130 F.3d 1305, 1307 (8th Cir. 1997)*; *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 485-86 (8th Cir. 1993)*.

Of these factors, the Eighth Circuit has "repeatedly emphasized the importance of a showing of irreparable harm." *Caballo Coal Co. v. Indiana Michigan Power Co., 305 F.3d 796, 800 (8th Cir. 2002)*. "A party seeking relief must demonstrate that the injury is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Jackson v. Macalester Coll., 169 F. Supp. 3d 918, 921 (D. Minn. 2016)* (citing *Packard Elevator v. Interstate Commerce Comm'n, 782 F.2d 112, 115 (8th Cir. 1986)*). "The court must determine that a cognizable danger of future ***violation*** exists and that danger must be more than a mere possibility." **[*69]** *Rogers v. Scurr, 676 F.2d 1211, 1214 (8th Cir. 1982)*.

These cases—and, with them, each of the pending motions for preliminary injunctive relief—were stayed for over a decade pending the outcome of the *Karsjens* litigation. To the extent that plaintiffs can be said to have suffered legally redressable harm resulting from MSOP policies, it would be difficult to conclude at this time that the harm caused by the decade-old policies is *irreparable. See Watkins, Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003)* (noting that failure to show irreparable harm "is an independently sufficient ground upon which to deny a preliminary injunction.").

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[22] Plaintiffs McMoore and Pittman filed motions for a temporary restraining order *and* a preliminary injunction. *McMoore*, ECF No. 4; *Pittman*, ECF No. 2. Plaintiff Pettis's motion for injunctive relief, however, only requests a temporary restraining order. *Pettis*, ECF No. 5. Although there are material differences between a TRO and a preliminary injunction, including notice and hearing requirements and the permitted duration of the court's order, *see Fed. R. Civ. P. 65(a)-(b)*, these differences do not impact the court's analysis for the purposes of determining whether to issue such an order. *Tumey v. Mycroft AI, Inc., 27 F.4th 657, 665 (8th Cir. 2022)* (applying the same standard in determining whether to grant a TRO or preliminary injunction).

There is also a more practical concern: To the extent that plaintiffs seek prospective relief from policies in place at MSOP in 2011 or 2012, it is doubtful that that those policies remain in effect, at least in all respects.[23] Many aspects of plaintiffs' remaining claims for injunctive relief have likely become moot as a result of these policy amendments, as MSOP has altered procedures to take account of client concerns or the direction of courts of this District.

This Court will therefore recommend that each of the decade-old motions for preliminary injunctive relief be denied without prejudice. To the extent that plaintiffs believe that they remain entitled to **[*70]** preliminary injunctive relief, notwithstanding the ensuing changes in MSOP policy and changes in personal circumstances, those plaintiffs may renew their request with a new motion for preliminary injunctive relief.

E. Declaratory Relief

McMoore, Pettis, and Pittman have also filed motions for a declaratory judgment. *McMoore*, ECF No. 6; *Pettis*, ECF No. 4; *Pittman*, ECF No. 3. Federal courts have the discretion to issue declaratory judgments pursuant to *28 U.S.C. § 2201* ("Declaratory Judgment Act"). The purpose of the Declaratory Judgment Act is to provide a remedy that will "minimize the danger of avoidable loss and the unnecessary accrual of damages." *Karsjens v. Jesson, 6 F. Supp. 3d 916, 947 (D. Minn. 2014)* (quoting *Koch Eng'g Co. v. Monsanto Co., 621 F. Supp. 1204, 1206-07 (E.D.Mo. 1985)*). A court may issue a declaratory judgment "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings." *Id.* (quoting *Alsager v. Dist. Ct. of Polk Cnty., Iowa (Juvenile Div.), 518 F.2d 1160, 1163-64 (8th Cir. 1975)*).

As described in detail above, Plaintiffs' claims concerning the constitutionality of Minnesota's civil commitment statutory schema and the MSOP program itself have been subject to significant litigation. *See, e.g., Karsjens I, 845 F.3d 394 (8th Cir. 2017)*, *Karsjens II, 988 F.3d 1047 (8th Cir. 2021)*. In this Court's view, a declaratory judgment would serve no purpose in "clarifying" **[*71]** or "settling" the legal issues because such issues have been winding their way through the courts for the last ten years while these cases have been stayed. Indeed, this Court recommends that certain claims be dismissed because this litigation has already settled some of these legal questions. The claims this Court does not recommend dismissing concern fact-intensive analyses requiring additional briefing. Because the claims surviving preservice screening under *28 U.S.C. § 1915(e)(2)* are fact-intensive and questions of law have been addressed by other litigation, this Court recommends that Plaintiffs' motions for declaratory relief be denied.

IV. RECOMMENDATION

Based on the foregoing, and on all of the files, records, and proceedings herein, **IT IS RECOMMENDED THAT**:

1. The following claims in the Complaints of Plaintiff Carey, (ECF No. 1), Plaintiff McMoore (ECF No. 1), Plaintiff Pettis (ECF No. 1) and Plaintiff Pittman (ECF No.

    1) be **DISMISSED WITHOUT PREJUDICE**:

    a. Plaintiffs' First Cause of Action: Failure to Provide Treatment.

    b. Plaintiffs' Second Cause of Action: Unreasonable Restrictions on Free Speech, **EXCEPT —**

    i. Plaintiffs' claim against Defendants Julie Rose, Rob Rose, and Terry Kneisel in their individual **[*72]** and official capacities alleging that they repeatedly intentionally delayed the distribution of Plaintiffs' mail. *Carey*, ECF No. 1 at ¶ 95; *McMoore*, ECF No. 1 at ¶ 94; *Pettis*, ECF No. 1 at ¶ 94; *Pittman*, ECF No. 1 at ¶ 94;

    ii. Plaintiffs' claim against the defendants in their official capacity alleging censorship of newspapers and magazines;

    iii. Plaintiffs' claim against the defendants in their official capacity alleging that they were restricted access to certain magazines and newspapers;

    iv. Plaintiffs' claim against the defendants in their official capacity alleging that they have been denied the right to associate with others; and

    v. Plaintiff's claim against the defendants in their official capacity alleging that they have been prohibited from wearing certain

[23] Indeed, this Court is well familiar from other litigation brought in this District in the ensuing ten years that many of the policies at issue have undergone several rounds of amendment.

clothing.

c. Plaintiffs' Third Cause of Action: Unreasonable Searches and Seizures, **EXCEPT—**

i. Plaintiffs' claim against the defendants in their official capacity alleging that their television, ring, and belt have been seized.

d. Plaintiffs' Fourth Cause of Action: Invasion of Privacy.

e. Plaintiffs' Fifth Cause of Action: Denial of Access to Legal Materials and Counsel, **EXCEPT —**

i. Plaintiffs' claim against the defendants in their **[*73]** official capacity alleging that their legal calls are not private and are being monitored by MSOP staff.

f. Plaintiffs' Sixth Cause of Action: Denial of Liberty.

g. Plaintiffs' Seventh Cause of Action: Denial of the Right to Religion and Religious Freedom.

h. Plaintiffs' Eight Cause of Action: Denial of Less Restrictive Alternative.

i. Plaintiffs' Tenth Cause of Action: The Right To Be Free from Double Jeopardy.

j. Plaintiffs' Twelfth Cause of Action: Conspiracy to Deny Due Process in ***Violation*** of the *Fourteenth Amendment of the United States Constitution* and *42 U.S.C. § 1985(3)*.

k. Plaintiffs' Thirteenth Cause of Action: Intentional Infliction of Emotional Distress.

l. Plaintiffs' Fourteenth Cause of Action: Negligent Infliction of Emotional Distress.

m. Plaintiffs' Fifteenth Cause of Action: Obligation of Contracts.

n. Plaintiffs' Sixteenth Cause of Action: Negligent Hiring and Credentialing of Defendants.

o. Plaintiffs' Eighteenth Cause of Action: Supervisor Liability.

p. Plaintiffs' Nineteenth Cause of Action: ***Violation*** of the Police Powers of the State.

q. Plaintiffs' Twentieth Cause of Action: ***Violation of the Oath*** of ***Office***.

r. Plaintiffs Pettis and Pittman's Twenty-First Cause of Action: Denial of Liberty.

s. Plaintiffs Carey and McMoore's Twenty-First Cause **[*74]** of Action: Conspiracy to Place Plaintiff Outside of the Law.

t. Plaintiffs' Twenty-Second Cause of Action: Defendants Are in ***Violation*** of the *14th Amendment to the United States Constitution* and *42 U.S.C. § 1983* In Support of Preventative [sic] Detention.

u. Plaintiffs' Twenty-Third Cause of Action: Denial of Health Care and Affordable Housing.

2. The following claims in the Complaints of Plaintiff Carey, (ECF No. 1), Plaintiff McMoore (ECF No. 1), Plaintiff Pettis (ECF No. 1) and Plaintiff Pittman (ECF No. 1) not be dismissed:

a. Plaintiffs' Ninth Cause of Action: Cruel and Unusual Punishment.

b. Plaintiffs' Eleventh Cause of Action: Denial of Due Process.

c. Plaintiffs' Seventeenth Cause of Action: Totality of the Conditions.

d. Plaintiffs' claim against Defendants Rob Rose and Julie Rose in their individual capacities alleging that they denied them access to the gym as punishment without due process of law. *McMoore*, ECF No. 1 at ¶¶ 65-68; *Carey*, ECF No. 1 at ¶¶ 66-69; *Pittman*, ECF No. 1 at ¶¶ 65-68; *Pettis*, ECF No. 1 at ¶¶ 65-68.

e. The individual capacity claim against Defendant Seth Doe in the Complaint of Plaintiff Carey, (ECF No. 1), alleging that Defendant Seth Doe grabbed him from behind "without provocation" and sprayed him with a chemical irritant **[*75]** in the face "without warning." *Carey*, ECF No. 1 at ¶¶ 53-55.

3. The Motions for Temporary Restraining Order and Preliminary Injunction of Plaintiff Earl Stephan McMoore, (ECF No. 4), Plaintiff Charles A. Taylor (aka Terrance A. Pettis), (ECF No. 5), and Plaintiff Michael Pittman, (ECF No. 2), be **DENIED WITHOUT PREJUDICE**.

4. The Motions for Declaratory Judgment of Plaintiff Earl Stephan McMoore, (ECF No. 6), Plaintiff Charles A. Taylor (aka Terrance A. Pettis), (ECF No. 4), and Plaintiff Michael Pittman, (ECF No. 3), be **DENIED**.

Dated: January 27, 2023

/s/ Tony N. Leung

Tony N. Leung

United States Magistrate Judge

District of Minnesota

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